Cast-Matic Corporation d/b/a Intermet Stevensville and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Cases 7-CA-45550, 7-CA-45994, 7-CA-46237, and 7-CA-46628

## September 17, 2007 DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On July 21, 2005, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a brief, and the General Counsel filed an answering brief. The Respondent filed a reply. The General Counsel also filed cross-exceptions and a brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(3) and (1) when it laid off foundry technician Sylvester Tebo on June 16, 2003.

The General Counsel excepted to the judge's recommended dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) by laying off maintenance technician Larry Brink on May 9, 2003, suspending employees Tom Turney and Lenora Richmond on February 28, 2003, and discharging Turney and Richmond on March 3 and 4, 2003, respectively. We find no merit in the General Counsel's exceptions, and we dismiss these allegations for the reasons set forth in the judge's decision.

There are no exceptions to the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) by: (a) twice disciplining Randy Penley in September 2002; (b) changing Penley's working conditions; (c) changing Tebo's working conditions; (d) suspending Tebo; (e) changing Henry Baker's working conditions; (f) reducing overtime for the maintenance technicians; and (g) removing items from and sealing doors within the maintenance technicians' breakroom. There are also no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by interrogating employees and by making threats of plant closure and relocation.

<sup>2</sup> Because we dismiss many of the complaint allegations at issue in this case, we do not believe that a broad cease-and-desist order is warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), for the violations we do find. See *Dilling Mechanical Contractors*, 348 NLRB 98 at 1 fn. 3 (2006). Member Schaumber notes that, in the circumstances of this case, a narrow cease-and-desist order is con-

#### I. INTRODUCTION

This case concerns the alleged continuation of unfair labor practices directed at the Respondent's production and maintenance employees who supported the Union during the organizational campaign in issue in Intermet Stevensville, 350 NLRB 1350 (2007) (Intermet I). After finding that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act, the judge in Intermet I recommended that the Board issue a Gissel<sup>3</sup> bargaining order. Based on that bargaining order, the complaint here alleged, among other things, that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain and provide information to the Union, dealing directly with its employees, and making unilateral changes in its employees' terms and conditions of employment. The complaint also alleged that the Respondent violated Section 8(a)(3) by discriminating against several employees, most of whom were actively involved in the organizational campaign in *Intermet I*.

The judge found that the Respondent violated Section 8(a)(3) and (5) of the Act in various respects. Pursuant to our decision in *Intermet I*, where we reversed the *Gissel* bargaining order, we reverse the judge's findings of violations of Section 8(a)(5) based on that bargaining order. Further, as discussed below, we reverse most, but not all, of the judge's findings of violations of Section 8(a)(3).

### II. FACTUAL BACKGROUND

Since 2001, the Respondent has produced aluminum die cast automobile parts at its facility in Stevensville, Michigan. Before that, it manufactured small die cast barbecue parts, which were made using a process dating from the 1950s and 1960s. Some time after 1996, the Respondent determined that this product line was no longer profitable and decided to begin manufacturing automobile parts.

sistent with the views he expressed in *Postal Service*, 345 NLRB 409, 412–415 (2005), enfd. as modified 477 F.3d 263 (5th Cir. 2007).

Member Walsh would adopt the judge's recommendation of a broad order. In his view, the numerous unfair labor practices found in this case and *Intermet I* plainly demonstrate "a proclivity to violate the Act" and a "widespread disregard for the employees' fundamental statutory rights" (*Hickmott*, supra at 1357), even without taking account of the 8(a)(5) violations that the majority reverses in the present case. See fn. 4, infra.

<sup>3</sup> NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

<sup>4</sup> Because Member Walsh agreed with the judge in *Intermet I* that a *Gissel* bargaining order against the Respondent was warranted, for the reasons stated in his dissent in that case, he would find in the present case that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain with or furnish information to the Union, dealing directly with its employees, and making unilateral changes to the employees' terms and conditions of employment.

<sup>&</sup>lt;sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The production of automobile parts required a totally new and high-tech casting process, which made significant use of computers, robotics, and other automated processes. The new process required all new machinery, including furnaces, crucibles, and robotics, and a complete renovation of the plant. None of the old production equipment was used in the new process. Nevertheless, with few exceptions, the Respondent's employees charged with maintaining the old equipment were retained to maintain and service the new equipment.

Implementation of the new process required capital expenditures of approximately \$10 million. Initially, the Respondent's corporate leadership was not receptive to the change, believing that the new products would be neither marketable nor profitable. Through the efforts of Joseph Barry, the Respondent's plant manager, corporate management was convinced to embark on the new business. However, acceptance of the plan carried with it the expectation of a significant return on the parent corporation's investment.

The new process and the new equipment required employees to learn new skills related to the new production process and maintenance of the new machinery. Accordingly, before the Respondent implemented the new process, Barry held group meetings, informing employees that it was necessary that they gain essential skills in order to justify the large capital investment the corporate parent had made in the Stevensville plant.

The Respondent began producing automobile parts using the new process around June 2001, with a view to increasing production for the 2002 automobile model year, which debuted in September 2001. The first full year for the new process and products was anticipated for the 2002 model year.

### III. UNFAIR LABOR PRACTICES

#### A. Alleged Violations of Section 8(a)(5)

Relying on the *Gissel* bargaining order recommended in *Intermet I*, the judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of its employees' employment, dealing directly with its employees, refusing to provide information requested by the Union, and refusing to bargain with the Union. We disagree. In light of our reversal of the recommended remedial bargaining order in *Intermet I*, we find that the Respondent did not have an obligation to bargain with the Union as the exclusive collective-bargaining representative of its employees. See *Desert Toyota*, 346 NLRB 132, (2005). Therefore, it did not violate the Act by refusing to bargain with or to provide information to the Union, nor did it violate the Act by dealing directly with its employees about, or mak-

ing unilateral changes to, their terms and conditions of employment.<sup>5</sup> Accordingly, we dismiss these allegations.

#### B. Alleged Violations of Section 8(a)(3)

#### 1. Constructive discharges of Baker, Tebo, and Penley

The judge found that the Respondent constructively discharged foundry technicians Henry Baker, Sylvester Tebo, and Randy Penley on June 24, August 26, and September 4, 2003, respectively, and thereby violated Section 8(a)(3) and (1) of the Act.<sup>6</sup> We disagree.

As more fully explained in the judge's decision, during early 2003, Penley, Tebo, and Baker worked together in the foundry on the first shift. They oversaw five to seven metal furnaces, with Penley handling furnace duties, Baker handling de-gas operations, and Tebo transporting molten metal from the foundry to the casting machines. In the spring and summer of 2003, the Respondent assigned them new duties, including duties relating to testing the quality of the metal used in the Respondent's production process. At the same time, pursuant to the Respondent's decision to reduce one foundry worker on each shift and to run the foundry often with just one worker, the Respondent also required each employee to perform all of the functions usually performed by the foundry team. Each eventually quit; they all testified that, among other reasons, they quit because they simply could not handle the work that was being assigned to them.7

In the judge's view, each of these employees quit because of the numerous unilateral changes the Respondent made in his job duties. Although he determined in each instance that the changes in job duties were not discriminatorily motivated, the judge nevertheless found that the Respondent's treatment of these employees was such that it "forced [them] to make the Hobson's Choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer." *Goodless Electric Co.*, 321 NLRB 64, 68 (1996). The judge explained:

<sup>&</sup>lt;sup>5</sup> In so finding, we do not pass on the judge's findings that the various unilateral changes were material, substantial, and significant.

<sup>&</sup>lt;sup>6</sup> As noted above, Tebo was unlawfully laid off on June 16, 2003. He was recalled from that layoff on July 14.

<sup>&</sup>lt;sup>7</sup> Penley did not dispute testimony that he also quit because he anticipated that he would fail a drug test, and Tebo testified that embarrassment and anger at the amount of downtime his work was causing partially motivated his decision. Baker testified that he quit because he simply couldn't do by himself the tasks required of him.

<sup>&</sup>lt;sup>8</sup> As noted above at fn. 1, the General Counsel filed no exceptions to the judge's dismissal of the allegations that the Respondent discriminatorily changed the working conditions of Baker, Tebo, and Penley.

[They] were unilaterally tossed from one job assignment to the other and had made complaints to management about the matter. If the Union had been recognized by the [Respondent] and in place to represent [them], [they] probably would have grieved [their] treatment, and bargaining over the changes would in all likelihood have been undertaken by the parties. [They] could not and, in spite of the possible merits of [their] complaint[s], [they] had no choice but to comply with the Respondent's directives or quit.

. . .

This, in my view, is an instance of a Hobson's choice that the Board would find violative of Section 8(a)(3).

We disagree with the judge's analysis because, even assuming the validity of the "Hobson's Choice" theory of constructive discharge, that theory is not applicable here. The Respondent did not condition its employees' continued employment upon their "abandonment of . . . the right to bargain collectively through representatives of their own choosing." *Superior Sprinkler*, 227 NLRB 204, 210 (1976); see also *Goodless Electric*, supra at 67–68. Indeed, as we found in *Intermet I*, the Union does not represent the Respondent's employees, nor is the Respondent obligated to recognize it. Accordingly, the Respondent's assignment of new job duties was not accomplished in derogation of the employees' right to union representation.

Thus, we find that the Respondent did not constructively discharge foundry employees Baker, Tebo, or Penley. Accordingly, we dismiss these allegations.

## 2. Maintenance technicians' "new" job descriptions

The judge found that the Respondent violated Section 8(a)(3) and (1) in May and June 2002 by issuing "new" job descriptions to the maintenance technicians in response to their active involvement in the union organizing campaign. We disagree.

The Respondent created the maintenance technician position and accompanying job description in 1998, when it operated under the old business. The new position offered maintenance department employees more

money, but also changed the direction of the job to meet the needs of a more automated manufacturing process. That change was consistent with Barry's concern that the Respondent's old business and the associated production process were not profitable and needed to be phased out.

The Respondent issued a new maintenance technician job description in July 2001. It summarized the position as follows: "The Maintenance Technician is responsible for maintaining the equipment and facilities to ensure minimum downtime and maximum life[.] These responsibilities include but are not limited to: installation, preventive service, troubleshooting, and repair of equipment and facilities." This job description also listed 22 skill-related duties and responsibilities. The judge found "the revised [job] description did not include material changes in the basic skills associated with the maintenance tech position as envisioned by the 1998 description. However, the revised description placed greater emphasis on automation and electronic skills in keeping with the technology associated with the new production process."

In May and June 2002, maintenance technicians Mark Cook, Robert Crosby, Ronald Wagner, George Ludwig Jr., and William Shembarger received their first performance reviews since the new production process was implemented in June 2001. The Respondent attached a copy of the 2001 job description to each of these reviews. On each one, Supervisor and Facility Manager Dave Patterson wrote notes concerning the status of the employee's acquisition of, and established time targets by which he was to acquire, the skills listed in the job description. For each of the maintenance technicians, Patterson's notes indicated that he had failed to acquire many of the skills necessary to maintain the new machinery.

Prior to receiving their May and June 2002 evaluations, the maintenance technicians had not seen the 2001 job description. Also, the Respondent had not given them deadlines by which to acquire the skills listed in their job descriptions. However, the maintenance technicians did not dispute that they had not attained the skills necessary to provide maintenance services for the new machinery. Indeed, Shembarger and Crosby testified that they had not attempted to attain skills relating to the new machinery.

The judge determined that the Respondent's issuance, in May and June 2002, of the 2001 job description to the employees was unlawful. In contradiction of his earlier finding that the 2001 job description "did not include

<sup>&</sup>lt;sup>9</sup> Because Member Walsh would have imposed a *Gissel* bargaining order in *Intermet I*, he does not agree with his colleagues that the Respondent was not obligated to recognize the Union. However, the line of cases relied upon by the judge applies only where employers require employees to work under conditions that deviate from those already established in a collective-bargaining agreement, i.e., require them to abandon the union. See, e.g., *Goodless Electric*, supra; and see *RCR Sportswear*, 312 NLRB 513, 513–514 (1993). In this case, the employees were not faced with such a choice. For this reason, Member Walsh agrees with his colleagues that Baker, Tebo, and Penley were not unlawfully constructively discharged.

 $<sup>^{10}</sup>$  The Respondent issued these reviews shortly after the Union's election loss (April 5, 2002), and while there were ongoing investigations into the unfair labor practice charges later considered in *Intermet I*.

material changes," he found that the job description attached to the May and June 2002 reviews contained "new" job requirements, which, for the first time, established time targets for acquisition of job-related skills.<sup>11</sup> Then, after finding that the General Counsel had met his initial burden to show that the employees' union conduct was a substantial or motivating factor in the issuance of the 2001 job description, 12 the judge determined that the Respondent's defense, i.e., that the changes in the 2001 job description were required by the change in business and technology, was a pretext for covering up "its real intention to strike at the Union and its supporters and to undermine support for the Union at its facilities." In this regard, the judge noted that, while the Respondent initiated its implementation of the new equipment in 2001, it waited until May and June 2002 to "attempt to get the maintenance techs up to speed on the new machinery." In his view, the Respondent's delay was caused by "the Union's organizing drive and the active involvement of the maintenance techs therein."

We disagree. Even assuming that the General Counsel met his initial burden under Wright Line, we find that the Respondent demonstrated that it would have issued the 2001 job description absent the maintenance technicians' union activities. The Respondent revised the job description in July 2001, coinciding almost perfectly with its implementation of the new manufacturing process, and well before it became aware of any union activity in its facility. 13 As the judge found, the 2001 job description did not include material changes in the skills associated with the maintenance technician position, but merely "placed greater emphasis on automation and electrical skills in keeping with the technology associated with the new production process." In order to maintain the new production machinery, the maintenance technicians needed to obtain these skills. Thus, the issuance of the 2001 job description was merely a necessary and integral step in the Respondent's lawfully adopted plan to change its business.

The Respondent also demonstrated that it would have established deadlines by which the maintenance technicians were to acquire the skills required by the new machinery even absent their union activity. The maintenance technicians were not evaluated during the first year of the new business. During that time, the Respondent provided opportunities for on-the-job and formal training relating to maintenance of the new machinery. The maintenance technicians had not attained many of those skills within that first year. In light of these circumstances, the Respondent's imposition of the deadlines was another necessary step in its implementation of the new business.

In this vein, we disagree with the judge's determination that the Respondent did not attempt to transition the maintenance technicians to the new machinery until after the Union's organizing drive had begun. As noted above, the Respondent informed employees in 2001 that they would need to acquire new skills related to the operation and maintenance of the new production machinery. The specification of these new skills in the 2001 job description, and the imposition of deadlines for their attainment in 2002, was thus a logical consequence of business decisions reached and announced well before the organizing drive commenced. The Respondent's decision to take these actions only after it provided the maintenance technicians with opportunities to learn the skills required by the new machinery, through on-the-job training and formal course work during the installation of the new machinery, and on a daily basis once the machines were up and running, further supports our finding that it would have taken the same action absent the maintenance technicians' union activities. Consequently, we dismiss this allegation.<sup>14</sup>

# 3. Layoff and reassignment of maintenance technicians

The judge found that the Respondent violated Section 8(a)(3) and (1) on May 9, 2003, when it laid off Shembarger and reassigned Cook and Ludwig Jr., and again on June 17, 2003, when it laid off Crosby. For the reasons that follow, we agree.

As the judge more fully explained, the Respondent's financial situation in May 2003 necessitated cost-savings adjustments. During the first quarter of 2003, the Respondent's sales of its new product were not reaching the levels Barry had estimated when preparing the 2003 budget. In spite of the lower sales, Barry decided to take a risk and build inventory during this quarter, mainly to

<sup>&</sup>lt;sup>11</sup> The judge did not find that the "new" job requirements were onerous, as the General Counsel had alleged. Rather, the judge found that the Respondent provided sufficient training and training opportunities for the maintenance technicians to acquire the skills required by the Respondent's new production process.

<sup>&</sup>lt;sup>12</sup> See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>&</sup>lt;sup>13</sup> The Respondent first became aware of its employees' union activities in February 2002. See *Intermet I*.

<sup>&</sup>lt;sup>14</sup> In light of this finding, we also reverse the judge's finding that the Respondent unlawfully issued unfavorable evaluations to these same employees between September and December 2002. The judge determined that these evaluations were unlawful because they were premised on the employees' failure to attain skills that the Respondent had discriminatorily required of them. Having reversed the judge's finding with respect to the job descriptions, it follows that the evaluations themselves were lawful, particularly since the maintenance technicians admitted their failure to attain the skills required to maintain the new machinery.

keep the employees employed and to give the Stevensville plant an appearance of strength. His hope was that he could start selling this inventory in the second and third quarters of 2003. Various factors conspired to frustrate Barry's plans, and, by early April 2003, the Respondent found itself in a financial crisis.

Accordingly, in early May 2003, Barry undertook costsaving measures which included staff cuts, redistributing regular employees, and eliminating temporary employees. Barry consulted with each department head to determine how best to achieve savings within the department. With respect to the maintenance department, Department Head Patterson recommended that the maintenance technicians be laid off because the machines were new and did not require much maintenance and, because of the unrealized sales of inventory, there would be fewer machines running and requiring servicing.

On May 9, 2003, Patterson and Human Resources Manager Mitchell Maze met with maintenance technicians Shembarger, Cook, and Ludwig Jr. Patterson told them that, because sales were slow, the Respondent was taking measures to cut costs. Accordingly, Patterson asked each to choose between taking a voluntary layoff and accepting a job, with a reduction in pay, on the final pack line.<sup>15</sup> Shembarger refused the job on the final pack line and was laid off, but both Cook and Ludwig Jr. accepted the reassignment.

On or about June 2, 2003, the Respondent hired six new regular hourly employees, including two, Brian Stone and Ryan Lee, who, as electrical controls technicians, performed maintenance work like that performed by employees in the maintenance technician classification. Cook and Crosby testified that they witnessed Valer Pascanu, another maintenance technician who had recently been promoted to maintenance engineer, performing traditional maintenance technician work shortly after the layoffs as well.

Subsequently, on June 17, 2003, Crosby met with Patterson and Maze. Patterson told Crosby that, for economic reasons, there had to be another round of layoffs and that he was to be laid off. Patterson allowed Crosby to choose between a voluntary layoff and a job on the final pack line. He chose the voluntary layoff.

At the hearing, Barry testified that the maintenance technician layoffs were made in an effort to reduce production. He also testified that there was less maintenance work needed because fewer machines were in operation, and, consequently, that fewer maintenance technicians would be required for preventive maintenance services.

Barry first testified that he did not know whether the layoffs were conducted by seniority within the plant or within the job classification. Later, he testified that the layoffs went "by job classification, by shift, by seniority." Even later, he testified that they were conducted by plantwide seniority. Patterson, on the other hand, testified that the maintenance technicians were laid off according to their seniority within the classification, i.e., the employees with the least time in the classification were the first to be laid off.

The judge determined that the layoffs of Shembarger and Crosby, and the reassignments of Cook and Ludwig Jr., were unlawful. We agree. Our analysis of whether these layoffs and reassignments violated the Act is governed by the test articulated in Wright Line. Under that test, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See Willamette Industries, 341 NLRB 560, 562 (2004).17 If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See Manno Electric, 321 NLRB 278, 280 fn. 12 (1996).

We agree with the judge that the General Counsel met his initial burden here. The Respondent was aware that Shembarger, Crosby, Cook, and Ludwig Jr. were active supporters of the Union during its organizing campaign. The Respondent's antiunion animus is clear from the numerous unfair labor practices we found it committed in *Intermet I. Dynasteel Corp.*, 346 NLRB 86, slip 89 (2005). Accordingly, the General Counsel proved that antiunion animus was a substantial or motivating factor in the layoffs and reassignments.

Despite its economic situation in May 2003, the Respondent has failed to demonstrate that it would have

<sup>&</sup>lt;sup>15</sup> For Shembarger, the reduction in pay would have been approximately \$5.37 per hour; for Cook it was \$0.10 per hour; and for Ludwig Jr., \$0.01 per hour. The large discrepancy reflects Shembarger's seniority over Cook and Ludwig Jr.

<sup>&</sup>lt;sup>16</sup> This second round of layoffs included that of foundry technician Tebo, which we also find was unlawful. See fn. 1 above.

<sup>&</sup>lt;sup>17</sup> Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation

laid off Shembarger and Crosby, or reassigned Cook and Ludwig Jr., in the absence of their protected activities. We agree with the judge that the Respondent has proven that the economic situation at the Stevensville plant was such that cost-savings adjustments were necessary, and that a reduction of labor costs was a reasonable response to that situation. Nevertheless, it still falls to the Respondent to demonstrate by a preponderance of the credible evidence that it would have taken the same action against the same individuals even in the absence of their union activities. See Hoffman Plastic Compounds, Inc., 306 NLRB 100, 106 (1992), enfd. 208 F.3d 229 (D.C. Cir. 2000), revd. on other grounds 535 U.S. 137 (2002) (even where employer is able to prove that layoffs are justified by economic reasons, Wright Line burden is to demonstrate that specific employees would have been selected for layoff regardless of their union activities). The Respondent has failed to meet this burden.

First, the Respondent's proffered reasons for deciding to conduct layoffs in the maintenance technician classification are suspect. Barry testified that the Respondent laid off the maintenance technicians because sales were low and production needed to be cut. When questioned by the judge on this point, Barry was unable to explain the connection between cutting production and the decision to lay off maintenance employees. Usually, when layoffs in production and maintenance units occur, maintenance employees are the last to go; this is because the remaining employees cannot use machinery unless it is working. *Flexsteel Industries*, 316 NLRB 745, 757 (1995). The Respondent did not lay off any production employees at the time it laid off the maintenance technicians.

The record also does not support the Respondent's claim that there was less maintenance work to be done at the time of the May layoffs. Company records demonstrated that preventive maintenance hours increased from March to May 2003. Further, both before and after the May 9 layoff was announced, the Respondent hired into new positions employees who performed the work previously performed by the maintenance technicians. <sup>19</sup>

Second, the Respondent offered inconsistent testimony concerning the order in which the maintenance techni-

cians were laid off. Barry and Patterson gave differing accounts of the basis for selection; neither was correct. Patterson testified that the layoffs were conducted according to seniority in the classification. By classification, Crosby and Shembarger were the two most senior maintenance technicians; nevertheless, both were targeted over Miller and Wagner, who were never approached about the layoffs. Barry gave inconsistent testimony on this point, though his final answer was that the layoffs were conducted by plantwide seniority. While Shembarger, Cook, and Ludwig Jr. had less plantwide seniority than the maintenance technicians who were not laid off, the Respondent's layoff policy, which requires the Respondent to conduct layoffs on the basis of "seniority by department and job description," does not mention plantwide seniority. The Respondent offered no explanation why it deviated from its established policy when it chose Shembarger, Cook, and Ludwig Jr. for layoff. See Meyer Stamping & Mfg. Co., 237 NLRB 1322, 1323 (1978).

The same reasons undercut the Respondent's proffered reasons for laying off Crosby. Of particular note are the Respondent's hiring practices between the first layoff and Crosby's. In that 5-week span, the Respondent hired six additional regular hourly employees, including Stone and Lee, both of whom performed maintenance work. Indeed, Stone, Lee, and Pascanu were performing the work of the maintenance technicians during Crosby's final weeks with the Respondent. In light of this evidence, the Respondent's claim that Crosby's layoff was justified by a reduction in maintenance work is untenable.

For the foregoing reasons, we find, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) when it reassigned Cook and Ludwig Jr., <sup>20</sup> and laid off Shembarger and Crosby. <sup>21</sup>

#### ORDER

The Respondent, Cast-Matic Corporation d/b/a Intermet Stevensville, Stevensville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>&</sup>lt;sup>18</sup> Member Schaumber notes that the Respondent, in attempting to justify these layoffs, did not specifically rely on the poor evaluations it issued to the maintenance technicians in late 2002.

<sup>&</sup>lt;sup>19</sup> Indeed, a mere 8 days after conducting the first layoffs, the Respondent administered its maintenance evaluation test to applicants for newly-posted openings in the controls' technician position, which, although not completely coextensive with the duties of the maintenance technician position, shared many duties with that position. The cover page of that test stated: "The primary intent of this evaluation is to determine your key abilities as a maintenance person."

<sup>&</sup>lt;sup>20</sup> We note that Cook and Ludwig Jr. retained their employment with the Respondent, albeit in different positions with slight reductions in pay. Where the transfer or reassignment of an employee is motivated by antiunion sentiment, the Board will find a violation of Sec. 8(a)(3) and (1). *Aero Industries*, 314 NLRB 741, 752 (1994); *Wayne W. Sell Corp.*, 281 NLRB 529 (1986).

<sup>&</sup>lt;sup>21</sup> Despite the foregoing, the Respondent may offer evidence at the compliance stage to prove that any of the four laid-off or reassigned maintenance technicians would have been legitimately laid off subsequent to their discriminatory layoff or reassignment, in mitigation of backpay due under the terms of this Decision and Order. See *Quality Aluminum Products*, 278 NLRB 338, 340 (1986).

- (a) Laying off or reassigning employees because of their union support and activities.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days of the date of this Order, offer the following individuals full reinstatement to the position they held on the dates below or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed:

William Shembarger May 9, 2003 Mark Cook May 9, 2003 George Ludwig Jr. May 9, 2003 Robert Crosby June 17, 2003

- (b) Make the above-referenced employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- (c) Make Sylvester Tebo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facilities in Stevensville, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off or reassign our employees because of their union support and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this notice, offer William Shembarger, Mark Cook, George Ludwig Jr., and Robert Crosby full reinstatement to the positions they held on the following dates:

William Shembarger May 9, 2003 Mark Cook May 9, 2003 George Ludwig Jr. May 9, 2003 Robert Crosby June 17, 2003

If these jobs no longer exist, WE WILL offer them a substantially equivalent position without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Shembarger, Mark Cook, George Ludwig Jr., Robert Crosby, and Sylvester Tebo whole for any loss of earnings and other benefits they suffered as a result of our unlawful action against them.

<sup>&</sup>lt;sup>22</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## CAST-MATIC CORPORATION D/B/A INTERMET STEVENSVILLE

Steven Carlson, Esq. and Jamie J. Vanderkolk, Esq., for the General Counsel.

Valerie B. Speakman, Esq. and Gordon Jackson, Esq. (Jackson Shields & Yeiser), for the Respondent.

Michael L. Fayette, Esq. (Pinsky, Smith, Fayette & Hulswit), for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me in Stevensville, Michigan, on October 28–30, 2003; January 27–28, May 11–13, and August 16–18, 2004, pursuant to an original charge filed in Case 7–CA–45550 on October 21, 2002, by the Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), against Cast-Matic Corporation d/b/a Intermet Stevensville (the Respondent). The Union filed an amended charge in this case on October 23, 2002; a second amended charge on December 9, 2002; and a third amended charge on January 29, 2003.

On February 27, 2003, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint against the Respondent and scheduled hearing on the matter for June 5, 2003. On March 4, 2003, the Respondent timely filed its answer to the complaint essentially denying the commission of any unfair labor practices.

On March 7, 2003, the Union filed an original charge in Case 7–CA–45994 against the Respondent; the Union filed an amended charge in this case on April 29, 2003. On May 13, 2003, the Regional Director issued a complaint against the Respondent consolidating Case 7–CA–45550 with Case 7–CA–45994 and scheduling a hearing for June 30, 2003. The Respondent filed a timely answer to the consolidated complaint and asserted affirmative defenses on May 21, 2003.

On June 20, 2003, the Union filed an amended charge in Case 7–CA–46237 against the Respondent. The Union filed its second amended charge and a third amended charge against the Respondent in this case on July 3 and September 8, 2003, respectively.

On September 29, 2003, the Regional Director issued a complaint consolidating the three aforementioned cases and scheduling a hearing for October 28, 2003. The Respondent timely filed its answer to this consolidated complaint on October 7, 2003. On November 6, 2003 (after the record was opened), the General Counsel filed his motion to consolidate and amend the second amended consolidated complaint based on, inter alia, the Union's having filed a charge in a new case, Case 7–CA–46628, on September 16, 2003, and the need to correct the spelling of the name of an alleged supervisor.

On November 25, 2003, I granted the motion, on grounds of the new complaint allegations being closely related to the facts and issues presented in the consolidated complaint and there being no opposition by the Respondent.<sup>3</sup> On December 9, 2003, the Respondent timely filed its answer to the second amended consolidated complaint and essentially denied the commission of any unfair labor practices and asserted certain affirmative defenses.<sup>4</sup>

The consolidated complaint as amended alleges<sup>5</sup> that the Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act) on numerous occasions during calendar years 2002 and 2003. At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses and after considering the posthearing briefs by the General Counsel, the Union, and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a corporation, with an office and place of business and facility in Stevensville, Michigan, is a manufacturer of aluminum and zinc castings for the automobile industry. During the calendar year ending December 31, 2002, the

- (A) Insert the following new par. 1(k):
- (k) The charge in Case GR-7-CA-46628 was filed by the Charging Union on September 16, 2003, and a copy was served by regular mail on Respondent on the same date.
- (B) Correct the spelling of Preston Eastep's name in pars. 9(j), (k), (n) and (o).
  - (C) Add the following subpars. 9(r) and 9(s):
- 9(r) About August 26, 2003, through Preston Eastep, assigned to employee Randy Penley the duties previously performed by employees Sylvester Tebo and Henry Baker in addition to certain of his regular duties as furnace technician.
- 9(s) About September 4, 2003, by the conduct described in paragraphs 9(j)(2) and 9(r), Respondent caused the termination of its employee Randy Penley.
- (D) In pars. 21, 22, and 26, amend the phrase, "paragraphs 9(g) through 9(o)" to read "paragraphs 9(g) through 9(o) and 9(r)."
- (E) Add Randy Penley's name to par. 2(d) in the prayer for relief

The motion has been included in the official record as GC Exh. 1(qq).

- <sup>3</sup> A copy of my order has been included in the official record as GC Exh. 1(tt).
  - <sup>4</sup> See GC Exh. 1(uu).
- <sup>5</sup> The General Counsel at the conclusion of his case-in-chief withdrew pars. 8, 9(a)(5), (d)(5), and (i)(4).

The General Counsel, in his brief, also required that the complaint allegations contained in par. 9(b) of the amended complaint be withdrawn. I will grant that request.

- <sup>6</sup> The Respondent's motion to correct transcript is granted.
- <sup>7</sup> On December 28, 2004, the Respondent filed its response to the Union's and the General Counsel's posthearing briefs.

Sec. 102.42 of the Board's Rules and Regulations govern the filing of briefs in Board proceedings before administrative law judges. There are no provisions in the Rules for the filing of reply briefs. By long established practice, reply briefs are not considered by Board judges. I have not considered this brief in resolving the instant matter.

<sup>&</sup>lt;sup>1</sup> This consolidated complaint was styled second order consolidating cases, second amended consolidated complaint and notice of hearing.

<sup>&</sup>lt;sup>2</sup> This motion was filed with me by mail at the Division of Judges Headquarters in Washington, D.C. The consolidated complaint included the following amendments:

Respondent purchased and received at its Stevensville facility materials and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRELIMINARY ISSUES AND BACKGROUND TO THE LITIGATION

#### A. The 10(b) Issue

The Respondent contends that the amended complaint in paragraphs 9(a)(1), (2), (3), (4,) and (5); 9(b)(2); and 9(d) should be dismissed on grounds of untimely filing under Section 10(b) of the Act. As noted, the General Counsel has withdrawn paragraphs 9(a)(5), 9(b) in their entirety, as well as 9(d)(5). Accordingly, for purposes of the 10(b) issue, I will treat only with the remaining complaint allegations in paragraphs 9(a)(1), (2), (3), and (4), and 9(d)(1), (2), (3), (4), and (6).

The General Counsel in opposition essentially contends that the allegations in paragraph 9(a) are "closely related" to the allegations contained in the timely filed original charges and relate back to the initial 10(b) period. Therefore, he argues that dismissal on the grounds of untimely filing is not appropriate.

The pertinent 9(a) charges, basically assert that five alleged discriminates on dates covering May 3 through about June 27, 2002, were each issued new job descriptions unlawfully imposing new and onerous conditions by the Respondent. These charges first appear as to some of the affected employees in the aforementioned third amended charge filed by the Union on October 21, 2002, and received by the Respondent around that time.

The original charge, as noted previously, was also amended a second time by the Union in this case on October 23 and December 9, 2002; these charges were received by the Respondent on or about the dates in question. These amended charges name two of the affected employees as having had imposed upon them the allegedly new and more onerous job descriptions and duties.

Section 10(b) of the Act provides in pertinent part:

.... That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

The five employees identified in the 9(a) complaint and the dates on which the allegedly unlawful conduct took place are as follows:

Mark Cook—May 3, 2002 Robert Crosby—June 18, 2002 Ronald Wagner—June 20, 2002 George Ludwig Jr.—June 25, 2002 William Shembarger—June 23, 2002

Applying the Act's 6-month limitation strictly, charges relating to Cook should have been filed no later than about November 3, 2002; Crosby, December 18, 2002; Wagner, December 20, 2002; Ludwig, December 25, 2002; and Shembarger, December 27, 2002.

Directing myself to the charges, I note the Union's original charges (October 21) state that Shembarger and Crosby were allegedly not given their scheduled performance reviews by the Respondent for unlawful reasons on September 27 and October 17, 2002, respectively. The October 23 amended charge states that on September 27 and October 17, 2002, Shembarger and Crosby, respectively, were given negative performance reviews, again for allegedly unlawful reasons.

The December 9 amended charges states, inter alia, that the Respondent unlawfully imposed new and onerous conditions on Shembarger's and Crosby's employment on June 27 and October 21, 2002.

The January 29, 2003 third amendment (the fourth amendment, counting the October 23 amendment) charges the Respondent with additional unlawful conduct against Crosby and Shembarger stemming from the June 18 and October 17, 2002 performance evaluations of Crosby and the June 27 and November 21, 2002 evaluations of Shembarger. The third amendment for the first time charges the Respondent, inter alia, with imposing new and onerous conditions on the employment of employees Mark Cook, George Ludwig Jr., and Ron Wagner.

First, it appears that as to Crosby and Shembarger, the 9(a) charges are clearly timely filed and I would so find. Regarding the remaining three—Cook, Wagner, and Ludwig Jr.—I would concur with the General Counsel, that the complaint allegations, though technically beyond the 6-month period, are appropriately joined in the complaint. As will later herein become evident, this case reflects for all intents and purposes a continuation of activities and events pertinent to another case before the Board involving the same parties and in some cases the same witnesses. Notably, the alleged discrimination in the 9(a) complaint allegations are all maintenance technicians who the General Counsel asserts were targeted en masse by the Respondent in its effort to defeat and rid itself of the Union. He asserts further that the timely filed charges relating to the three maintenance techs arose in the context of an unlawful campaign against the Union and involve the same legal theory, similar proof, and defenses as those associated with Shembarger and Crosby. I would find and conclude that a dismissal of the 9(a) complaint allegations is not warranted. See Ross Stores, Inc., 329 NLRB 573 fn. 6 (1999); and Redd-I Inc., 290 NLRB 1115 (1988).

For similar reasons, I decline to dismiss the complaint allegations in paragraphs 9(d)(1), (2), (3), (4), and (6). These allegations pertain to the same five maintenance techs for a period covering September 30 and December 17, 2002, and stem from the aforementioned amended charges.

<sup>&</sup>lt;sup>8</sup> Par. 10 of the amended complaint alleges that complaint allegations 9(a)(5), 9(b), and 9(d)(5) constitute conduct undertaken by the Respondent because the affected employees formed and assisted the Union and to discourage them from engaging in union and other concerted activities. Accordingly, these allegations are per force withdrawn consistent with the General Counsel's withdrawal of the pertinent charges.

#### B. Background to the Instant Litigation: Intermet I

This case is or may be at least viewed as a sequel to a case (JD–54–03) heard by Administrative Law Judge C. Richard Miserendino in the fall of 2002 and decided by him on May 16, 2003. This case is presently on appeal before the Board and at this writing has not been decided. This prior litigation involved the Respondent and the Union. A number of the witnesses who testified in Judge Miserendino's case also testified in the instant litigation.

I believe it will be helpful gaining an understanding of the present case by summarizing the facts, issues, and the judge's findings and conclusions of the prior case which I will sometimes refer to as *Intermet I* to distinguish it from the instant case, which I will refer to as *Intermet II* where necessary for clarity.

Intermet I involved numerous charges of unlawful conduct on the part of the Respondent occurring in the context of the Union's attempt to organize the Company's production and maintenance workers; the allegedly unlawful conduct took place both during the organizing campaign and afterwards.

Writing a 70-page opinion, Judge Miserendino found and concluded in material part that since February 20, 2002, a majority of the Respondent's employees, in a unit he found constituted a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, signed union authorization cards designating and selecting the Union as their representative for purposes of collective bargaining with the Respondent.

The judge also found that since February 20, 2002, and continuing through the date of his decision, the Union has been the representative for purposes of collective bargaining of the employees in the unit of production and maintenance workers with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; that since February 20, 2002, and continuing to the date of his decision, the Union has requested that the Respondent recognize and bargain collectively with it with respect to the aforementioned rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the unit.

The judge found that the Respondent had failed and refused to recognize and bargain with the Union. As a remedy for these findings of violations of the Act, the judge recommended that the Respondent be ordered to bargain with the Union as the exclusive representative of the employees in the unit in question and negotiate if possible a signed agreement.

Judge Miserendino also found the Respondent had committed 21 separate violations of Section 8(a)(1) of the Act; 6 separate violations of 8(a)(3); and 1 violation of Section 8(a)(5) (essentially the failure to recognize the Union as the unit employees' representative and bargain with it). I will consider Judge Miserendino's findings of unfair labor practice violations by the Respondent among the totality of circumstances associated with the complaint allegations in deciding the instant litigation. Overnite Transportation Co., 336 NLRB 387 (2001); Nelcorp, 332 NLRB, 179 (2000); Grand Rapids Press of Booth Newspapers, 327 NLRB 393, 395 (1998); Southern Maryland Hospital, 293 NLRB 1209 (1989).

Notably, in finding the many violations in question, the judge also made credibility findings regarding the various employee and employer witnesses. Consistent with Board authority, I will not disturb these findings and will consider the judge's findings based on witness credibility as established fact for purposes of resolving pertinent issues in the instant litigation. See *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

At the risk of dramatic overstatement, the many 8(a)(1) violations as determined by Judge Miserendino run what may be fairly the entire panoply of such violations historically brought under the Act.<sup>9</sup>

Regarding the judge's finding of a number of 8(a)(3) violations, I note that he determined that the Respondent not only targeted a known union supporter for discriminatory discipline but also unlawfully disciplined, demoted, and reduced in pay an employee the Company merely suspected was a union supporter because of her close friendship with a known unionist.

With the judge's findings and conclusions in *Intermet I* serving as a backdrop, we turn to the complaint allegations in the instant litigation, *Intermet II*.

## C. The Instant Litigation: Intermet II; and Overview of the Charges

The consolidated complaint (the complaint), as amended, alleges that the Respondent during a period covering roughly May 3, 2002, through September 2003, committed numerous unfair labor practices against a number of its employees, all of whom either were union supporters and/or witnesses in the Intermet I campaign and prior Board hearing. Indeed, the thrust of the complaint is that these employees, and verily the department (maintenance) to which most were assigned at the Respondent's facility, were unlawfully targeted for reprisals because of their involvement in the organizing campaign and/or their testimony at the trial. The unlawful actions against the named employees include unfairly critical performance evaluations, disciplinary warnings, reduction of overtime, changing job requirements, issuing job descriptions, and imposing new and onerous employment conditions, requiring job-related training at employee expense and on their own time, suspensions, layoffs, and discharges, all in violation of Section 8(a)(3), (4), and (1) of the Act.

The Respondent is also charged with various acts of unlawful interference with employees' Section 7 rights, including coercive interrogations and threats of plant closure and relocation in violation of Section 8(a)(1) of the Act. Finally, the Respondent is charged with numerous violations of Section

<sup>&</sup>lt;sup>9</sup> For example, the 21 8(a)(1) violations include such unlawful action and conduct as promulgating and maintaining an overly broad no-solicitation/distribution rule, removing employee bulletin boards, restricting employee wearing of union buttons, telling them to remove union buttons, prohibiting bringing union literature into the plant; threatening job loss, threatening plant shutdown; threatening an increase in health insurance premiums if the Union were selected; creating an impression of surveillance of employee union activities; blaming delayed performance reviews on the Union; interrogating employees about their union support and telling employees that the Company was not afraid to break the law to keep the Union out.

8(a)(5) of the Act by failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees.

As noted, the alleged violations took place over a substantial period of time. Moreover, since the original complaint was amended several times, the consolidated complaint consequently reads in a somewhat disjointed fashion. I will for the sake of clarity, and hopefully brevity, treat with allegations in an order different from the manner in which the charges are presented in the complaint. For instance, as will become evident, some of the charges involve certain named employees in the Respondent's maintenance quality control and furnace departments. These allegations, in my view, form a continuum of sorts and will be treated as such for discussion. Other charges, where applicable, will be arranged likewise for discussion and resolution.

### D. The Respondent's Business and Operations During the Relevant Period

Before turning to the discussion of the unfair labor practice allegations, I believe it will be helpful to gain an understanding of the history<sup>10</sup> of the Respondent's business, which changed in terms of the products made by the Company as well as the technology and associated processes that were of necessity part of the new business. It will also be helpful to discuss the Company's operations during the relevant period.

The Respondent currently engages in the production of aluminum die cast automobile products, primarily front steering knuckles, that are sold to suppliers of parts and parts assemblies who in turn sell to major American automobile manufacturers. Thus, the Respondent basically is a second tier, as opposed to a direct supplier to the car makers, and has contracts with the direct (first tier) suppliers to make the knuckles in question. The Respondent embarked upon this line of work in 2001. Prior to that time, the Company manufactured small die cast barbeque parts. The barbecue products were made utilizing an older die casting process called high pressure, cold/hot chamber technology dating from the 1950s and 1960s. Some time after 1996, the Company's management determined that this product line was no longer profitable and embarked upon a new product, aluminum automobile parts, the production of which entailed a totally new and high tech casting process dubbed the pressure/counter/pressure or PCP process which incorporated substantially computers and robotics and other automated processes. This new process also was very costly to implement and reckoned to require capital expenditures (equipment and plant alterations) of around \$10 million.

Initially, the Respondent's corporate leadership was not receptive to the changeover, feeling that there was no market for the steering knuckles which were to be the main product. However, the Stevensville management was convinced that the product was marketable and over a period of time, mainly through the efforts of Joseph Barry, its plant manager, was able

to convince corporate leaders that the new business would be feasible and profitable. However, acceptance of the plan carried with it the expectation of a significant return on the investment by the parent corporation.

The new business, once approved, was scheduled to begin operation in calendar year 2001. The process started around June 2001 with a view to a ramping up of production for the 2002 automobile model year; notably, 2002 models were to debut in September 2001. The first full year for the new process and products was anticipated for the 2002 model year; and the corporate powers anticipated a significant return on the investment by then.

The PCP process required practically all new machinery including furnaces, crucibles, and robotics, and a complete rearrangement and renovation of the Stevensville plant. None of the barbeque grill production equipment was used in the new process.

In addition, the new process and the new equipment required new skills and even higher levels of skills for the employees engaged in the production of the steering knuckles. The Respondent's management introduced the new process to its employees (the basic composition of which was unchanged) through business operating system (BOS) meetings held monthly or bimonthly. These were plantwide meetings at which during the transition from the old to the new business, and after implementation, employees were apprised of the status of the operation and advised that their respective skill sets would have to be upgraded; that the expectations of corporate management were very high, that the new business was expected to succeed in view of the major financial commitment by the Company.

The Respondent's new product, the steering knuckles, and the process governing their production and sale merit a few words.

The aluminum steering knuckles are, as the name implies, connected to the front steering assembly of the automobiles to which they are attached. I examined one of the units during the trial. I found them to be dense, sturdy, but yet surprisingly light, considering their rather large dimensions. These parts are basically designed for the attachment of steering and brake components, e.g., tie rods and brake calipers. Accordingly, they are not really functional except to hold other steering related components. However, these knuckles clearly are integral to the safe operation of the automobile. If the unit fails, cracks, breaks, or is otherwise unstable, the steering of the vehicle is compromised with possibly fatal results. Thus, being a safety related component, the proper manufacture—basically ensuring the integrity of the metal—of each and every unit is extremely important.

In response to this safety issue and concerns, the Respondent established a series of procedures to ensure that the finished knuckles complied with the manufacturer's specifications for metal integrity, strength, endurance, and quality. It is abundantly clear on this record that all employees involved in the production/quality assurance process associated with the production of the knuckles were made aware of the procedures which were incorporated in written instructions called standard

<sup>&</sup>lt;sup>10</sup> I have relied in the main on the testimony of the Respondent's general manager, Joseph Barry, for portions of the relevant history of the Intermet Stevensville plant operations but also on the entire record herein. Barry presented as a credible historian, and the historical evidence is not in any meaningful way in dispute in the case.

procedure instructions (SPIs); employees also knew that compliance with the procedures was mandatory.

The Respondent's production procedures for the steering knuckles were focused on essentially two primary concerns—metal integrity and metal traceability. Metal integrity generally meant that the molten metal from which the knuckles were cast met the specifications as determined by the customer. Notably, steering knuckles are composed of 16 (approximately) different elements, with aluminum being the main metal component; these elements are combined in the metallurgical process in certain specific percentages within tolerable ranges or percentages. Every knuckle, without fail, must meet these specifications.

In order to ensure that each knuckle has been produced within specifications, the Respondent established procedures that would facilitate the tracing of the manufactured knuckle from beginning to end. These procedures included the metal identification by number of the molten pour by crucible (a big kettle-like container); the time of testing of each crucible; the chemical composition of the metallic batch; the results of testing of each crucible; and the identification of the employee involved at each stage. Utilizing these procedures, the Respondent, in the event of a failure of a knuckle in operation, could trace the knuckle's origin to determine if the knuckles were manufactured properly and whether other knuckles were defective. The Respondent also could ascertain which employee was involved at each stage of production. Obviously, these traceability procedures would be useful in the event a product liability suit were brought against the Respondent or other companies.

The Respondent created certain forms and utilized computerized systems to ensure metal integrity and traceability. These will be discussed at length later herein in the context of the specific unfair labor practice charges. Suffice it to say, it is clear from this record that producing a high quality and safe part was of the utmost concern to the Respondent during all times material to this litigation.

As noted earlier, the production of the steering knuckles entailed a major change in the business of the Respondent. Concomitant with the changeover from making simple barbeque parts to high tech steering knuckles was the introduction of new machines and processes to make the parts. The Respondent's employees charged with maintaining the old equipment, with few exceptions, were also retained to maintain and service the new equipment which was largely automated. Under the new process, metal was automatically fed to the smelting furnaces and the parts were cast using automated (robotic) equipment. The new machinery utilized in a much more substantial way modern electronics, hydraulics, pneumatics, and computers than the machinery and processes associated with the old business

With the foregoing serving as a backdrop, we turn to the complaint allegations.

#### III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

### A. The Charges Relating to the Respondent's Maintenance Department Employees

In paragraph 9, subparagraphs (a), (d), (g), and (i) of the complaint, the Respondent is accused of unlawfully discriminating against five named employees working in its maintenance department during the period covering about May 3, 2002, through June 17, 2003, in violation of Section 8(a)(3) and (1) of the Act. The Respondent is also charged with failing and refusing to bargain collectively with the Union as the exclusive representative for collective bargaining for these employees with respect to matters deemed terms and conditions of their employment in violation of Section 8(a)(5). 12

A few preliminary remarks about the employees who are alleged to be discriminated against by the Respondent because of their union support and involvement in the Union's organizing campaign.

It is clear on this record that the alleged discriminatees here, Robert (Bing) Crosby, William (Bill) Shembarger, Mark Cook, Ron Wagner, and George Ludwig Jr., all employees at relevant times in the Respondent's maintenance department, were open and active supporters of and activists in the union organizing campaign referred to in *Intermet I*. In addition to signing the Union's authorization petition, <sup>13</sup> each man credibly testified regarding his activities indicating active and open support of the Union and the Union's cause at the plant, that is, wearing UAW pins on shift; wearing union hats and buttons advocating "Vote for UAW" at the plant, passing out literature and speaking to employees about becoming part of a bargaining unit, testifying as a witness at the *Intermet I* trial, wearing at work union shirts, attending organizing meetings, and affixing prounion stickers on toolboxes. <sup>14</sup>

Notably, Shembarger, Crosby, and Cook each testified in the *Intermet I* case, a fact acknowledged by the Respondent's general manager (Barry) in the instant case. It seems clear, moreover, that the epicenter of the Union's organizing effort in *Intermet I* was in the maintenance department among the maintenance technicians—mainly Crosby, Shembarger, Cook, Wagner, and Ludwig Jr.—and this was known to the Respondent's supervisors.<sup>15</sup>

<sup>&</sup>lt;sup>11</sup> See GC Exh. 4, a form utilized by the Respondent which exemplifies the metal composition of the molten metal from which the knuckles are made.

<sup>&</sup>lt;sup>12</sup> The 8(a)(5) charges will be discussed in a separate section of this decision.

<sup>&</sup>lt;sup>13</sup> See GC Exh. 2. The signatures of the five employees are contained on the petition.

<sup>&</sup>lt;sup>14</sup> For instance, Wagner testified he wore UAW pins during his shift; Cook testified at the *Intermet I* hearing and stated he wore union hats, buttons, and shirts emblazoned with "Vote for UAW" before, during, and after the campaign and election; Crosby claimed that he served as an on-site organizer for the Union, passed out literature, spoke to the employees on behalf of the Union, and testified at the *Intermet I* hearing; Ludwig Jr. stated he attended organization meetings, wore shirts stating "Vote yes, the UAW at work" prior to and after the election; and Bill Shembarger stated that in addition to testifying at the hearing, he passed out union literature and wore T-shirts with a large union logo on it

<sup>&</sup>lt;sup>15</sup> A former supervisory employee, Don Torrey, a maintenance system engineer, testified that he was aware of the union organizing campaign and that it was generally known around the plant that the mainte-

The General Counsel contends, consistent with the charges that follow, that the Respondent embarked upon what he describes as a relentless retaliation against these employees because of their support for the Union and their involvement in the campaign. The discussion of the charges below will cover what the General Counsel contends is the progression of unlawful actions taken by the Respondent against the five employees which culminated in their ultimate layoffs in the early summer of 2003, about 1 year after the election.

#### 1. The issuance of the new job descriptions

We begin the discussion with the allegations in paragraph 9(a) which alleges essentially that the Respondent issued to the five named maintenance techs job descriptions that imposed new and onerous conditions and required them to undergo training and perform work on their own time and without compensation. The allegation charges that these job descriptions were issued through the Respondent's Stevensville facility manager, Dave Patterson, an admitted supervisor.

Again, I believe it will be helpful to discuss preliminarily the maintenance department job description, its genesis, and implementation in the Company.

The position of maintenance technician was essentially a new position created by the Company in 1998. Before its creation, employees assigned to perform maintenance work occupied other job classifications such as skilled trade working supervisor, millwrights, electricians, or simply performed preventative maintenance work. Patterson, it seems clear, drafted the position description for maintenance technician in 1998 when the Company still operated under the old business. <sup>16</sup> Patterson credibly testified that the new position was created in response to Shembarger and Crosby's request for opportunities to make more money, as they were at the top of the wage scale for millwrights; Wagner, an electrician, also sought more money.

Patterson also noted that at the time, management—mainly General Manager Joe Barry—was desirous of moving into a more automated manufacturing process, consistent with his concerns that the Respondent's old business and the associated production process was not profitable and needed to be phased out. So, according to Patterson, the maintenance tech position was created to give certain present employees more money and to change the direction of the job. On this latter point, the employees at the time who were made maintenance techs, namely Shembarger, Crosby, and Wagner, were told by Patterson that they would have to acquire new skills consistent with the

nance workers and another nonmaintenance employee were responsible for starting the campaign, and that these individuals overtly let it be known of their support for the Union. (Tr. 358.) Notably, one of the Respondent's supervisors, Brian Lehmkuhl, testified that he believed that the alleged poor performance of the named maintenance techs stemmed from instructions from the Union (or the Board) "not to learn"; and they were not trying to improve their job performance. (Tr. 156.)

<sup>16</sup> See GC Exh. 85, the May 8, 1998 position description for maintenance technician. The description among its other features includes a listing of the essential duties and responsibilities of the incumbent; there are 13 essential duties and one catchall provision ("additional assignments as required").

changed job.<sup>17</sup> The three employees accepted the new positions and the old positions of millwright and support trades working supervisor were eventually phased out.<sup>18</sup>

Between 1998 and 2001, the maintenance tech position as written did not materially change. As noted, in about 2001, the Company embarked upon the new business and the very substantial change in the production process. Accordingly, in about July 2001, the Respondent issued a revised description for the maintenance technician position. The revised position description did not include material changes in the basic skills associated with the maintenance tech position as envisioned by the 1998 description. However, the revised description placed greater emphasis on automation and electronics skills in keeping with the technology associated with the new production process.

The General Counsel called the five alleged discriminatees to testify about the job descriptions issued to them in the summer of 2002.

### a. William Shembarger's June 27, 2002 job description<sup>19</sup>

Shembarger testified that he began working for Intermet on March 21, 1983, and was employed as a maintenance tech for about 3–4 years; before that, he was employed as a millwright at the Company. Shembarger said his job included the repair and maintenance (preventive and otherwise) of the machinery located at the plant. According to Shembarger, his millwright duties and maintenance tech duties were about the same.

Shembarger stated that over the years, he had received evaluations of his work performance. However, the performance review he received from Patterson on June 27, 2002, was unusual in that in addition to the evaluation form, there were two extra pages purporting to be a job classification description that included what Shembarger considered "lots of extra duties." Shembarger also noted that for the first time, he did not get a raise which, in his view, was remarkable.

Shembarger stated that he discussed both issues with Patterson who went over the evaluation with him. According to Shembarger, Patterson told him he had to improve his skills in a lot of the areas covered by the evaluation; that he would have to undergo different training.

Shembarger noted that he had never seen the job description before this occasion, nor had he seen the handwriting that included time targets to acquire the 22 different skills required by the enumerated listing of skills and responsibilities of a maintenance tech. The comments from Patterson regarding his status

<sup>&</sup>lt;sup>17</sup> Patterson noted that in 1998, the Company was working with machines utilizing old technology that did not require in-depth knowledge about electronics and automation (basically computers and robotics).

<sup>&</sup>lt;sup>18</sup> See R. Exhs. 84 and 86, position descriptions for the millwright and support trades working supervisor, respectively, both dated May 8, 1998. I have credited generally Patterson's testimony regarding the genesis of the maintenance tech position and related historical events. There is no real dispute regarding this aspect of the matter at hand.

<sup>&</sup>lt;sup>19</sup> See GC Exh. 16, which includes the 2001 position description for maintenance techs that was attached to Shembarger's June 27, 2002 evaluation. The position description will be discussed later herein. It is referred to at this juncture for comparison only.

regarding the acquisition of the skills in question were also new to him.

Shembarger said he and Patterson went over the entire document discussing the comments and especially the time lines set forth for acquiring or improving his skills. According to Shembarger, he had never been given time limits for obtaining job-related skills and, in fact, had never been told that they existed; this was unprecedented in Shembarger's experience with the Company.

Shembarger said he raised with Patterson the maintenance techs' extra efforts and work they had taken upon themselves to prepare the plant for the new business. However, according to Shembarger, Patterson's response was twofold—he said the evaluation and job situation was not personal, merely a matter of business—and he (Patterson) started crying.

At the hearing, Shembarger was queried by the General Counsel regarding the training he had received prior to the June 2002 evaluation in the skill areas in which he was deemed to need improvement.

Shembarger identified the skill-related duties and responsibilities he was charged with completing in the new job description presented to him at his June 2002 performance evaluation. They are as follows:<sup>20</sup>

- 1. Perform all duties as required by specific operating procedures and work instructions as listed as part of the training program.
- 2. Provide preventive service to equipment and facili-
- 3. Troubleshoot, replace, and repair pneumatic, electrical, hydraulic, and mechanical equipment.
- 4. Installation and upgrading of electrical, hydraulic, and electronic equipment and facilities, building of electrical and hydraulic control units and systems involving programmable controllers.
- 5. May be required to train personnel in routine electrical, hydraulic, and electronic diagnosis, preventive maintenance and services.
- 6. Install and maintain automation equipment to support the manufacturing operation.
- 7. Read electrical and hydraulic schematics and ladder logic to solve machine problems.
  - 8. Write ladder logic for machines.
- 9. Complete reports related to plant operations to include but not limited to: PM check sheets, daily logs, breakdown/repair reports.
  - 10. Setup and program automatic equipment.
- 11. Establish machine to automation equipment inter-
- 12. Understand and follow the operational preventive maintenance system.

- 13. Must be able to demonstrate ability to operate powered lift truck in accordance with the power lift truck training manual.
- 14. Must be able to demonstrate ability to operate aerial lift in accordance with safe standard industry practice.
- 15. Must be able to demonstrate ability to operate overhead crane in accordance with safe standard industry practice.
- Troubleshoot as well as writes and designs PLC machine logic work with automated equipment programming.
  - 17. Design, build, and repair fabrications as required.
- 18. Support the manufacturing operation efforts to keep a continuous flow of high quality castings through the facility and to the customer.
  - 19. Implement facilities maintenance as required.
- 20. Interface with computer software in the course of completing daily assignments.
- 21. Responsible for understanding and following the standard practice instructions (SPIs) and standard operating procedures (SOPs) associated with this classification as listed in the training program.
- 22. Perform other duties as assigned in the ultimate support of manufacturing and the Company goals.

Shembarger was queried by the General Counsel regarding the training (formal) that he had received in the 22 enumerated skill-related areas.<sup>21</sup> Shembarger said basically that he had received no training with respect to numbers 3,<sup>22</sup> 4,<sup>23</sup> 7, 8, 10, 11,<sup>23</sup> 16,<sup>23</sup> and 20 prior to the June 2002 evaluation.

Shembarger also stated that the June 27 evaluation and job description for the first time in his career with the Respondent included specific deadlines for him to acquire the skill sets in question <sup>24</sup>

Shembarger stated that while he did sign the evaluation review, he later had misgivings about the matter. In August 2002, Shembarger said that he contacted his then supervisor, Brian Lehmkuhl, and asked that his signature be removed from the review because he felt that he could not complete the requirements in the time noted. Shembarger said that Lehmkuhl refused his request.

<sup>&</sup>lt;sup>20</sup> It should be noted that the discussion to follow regarding the other maintenance tech/alleged discriminates will deal with essentially the same job description and related skill areas. I have set out the relevant skill-related duties and responsibilities as they are listed and enumerated in the description for Shembarger. For subsequent discussion, I will abbreviate these for discussion of the other alleged discriminatees.

Notably, Shembarger's evaluation indicated that he could perform or possessed the skills for some of the areas in question. Presumably, he must have had prior training or acquired these skills either formally or through on-the-job experience.

<sup>&</sup>lt;sup>22</sup> Shembarger conceded that he did receive some training from a company—Prince—that related to the new die cast process that touched on number 3

<sup>&</sup>lt;sup>23</sup> Shembarger, however, later recalled receiving about 4 hours of programmable logic control (PLC) training that would relate to numbers 4, 11, and 16.

<sup>&</sup>lt;sup>24</sup> This review was Shembarger's first one in the new business and process. Other reviews encompassed the old business and old equipment. (Tr. 1334.) Shembarger noted that he did not have a review in 2001, correcting himself on cross-examination that he had received a performance review every year.

## b. Robert (Bing) Crosby's June 18, 2002 performance review and job description

Crosby considered himself a long-term employee at the Stevensville facility, having worked there since 1978. Crosby stated that he has been employed as a maintenance tech since about 1998 working the day shift—7 a.m. to 3:30 p.m. Before taking the maintenance tech job, Crosby said that he held the millwright's position at the Company.

Crosby related his June 18 performance review with his then supervisor, Patterson, alone in Patterson's office. Crosby first noted that the performance review differed from others that he had had, especially in terms of his not receiving a raise—a first; and there was for the first time a new job description attached to the evaluation form, one that he had not seen before. Crosby also noted that there were time targets written in the margin of the job description, and he had never had been given time targets to obtain skills during his employment as maintenances tech at the Company. Crosby admitted that this was his first review in the context of the new business.

At the hearing, Crosby identified his June 18 evaluation with the attached new job description<sup>25</sup> and noted that to him this latest description of his maintenance tech position was different from his 1998 description. He thought that the new description was, in so many words, a new job. Crosby stated that he had had prior reviews, usually annually, as a maintenance tech.<sup>26</sup> Crosby admitted that he had received a maintenance job description in 1998 or 1999, and it contained skill-related duties and responsibilities, just not as many as the new one. Crosby also admitted that when he went from millwright to maintenance tech, Patterson said there would be different skills required for him.

Crosby's June 18 job description, like Shembarger's, included handwritten comments about his competence or lack thereof to perform a given skill-related duty and responsibility. Accordingly, the General Counsel queried Crosby about the training he had received in the 22 enumerated items. Crosby stated that with respect to numbers 4, 7, 8, 10, 11, and 20, he had received no prior training prior to the June 18, 2002 review. He conceded that of the 22 skills, he was proficient in only 3 at the time.

## c. Ronald Wagner's June 20, 2002 performance evaluation and job description

Wagner, a current second-shift employee of the Respondent, has been employed with the company for about 26 years. Wagner stated that he is presently employed as a maintenance tech, a position he has held since 2000. Prior to this, his job classification was skilled trades working supervisor in the maintenance department. Wagner said that he has worked sec-

ond shift since around June 2003; he previously worked the third shift.

Wagner identified his individual evaluation form and attached job classification description which he signed on June 20, 2002. Wagner's job description contains 31 enumerated skill-related duties and responsibilities, differing substantially from those of the other maintenance techs involved here. They are as follows:

- 1. Perform all duties as required by specific operating procedures and work instructions as listed as part of the training program.
- 2. Provide and manage preventive service to equipment and facilities.
- 3. Perform and manage the troubleshooting, replacement and repairing of pneumatic, electrical, hydraulic, and mechanical equipment.
- 4. Perform and manage the installation and upgrading of electrical, hydraulic, and electronic equipment and facilities, building of electrical and hydraulic control units and systems involving programmable controllers.
- 5. May be required to train maintenance technicians and other personnel in routine electrical, hydraulic, and electronic diagnosis, preventive maintenance and services as well as other skill-related duties and responsibilities.
- 6. Perform and manage the installation and maintenance of automation equipment to support the manufacturing operation.
- Read electrical and hydraulic schematics and ladder logic to solve machine problems.
  - 8. Write ladder logic for machines.
- 9. Complete reports related to plant operations to include but not limited to: PM check sheets, daily logs, breakdown/repair reports.
- 10. Perform and manage the setup and programming of automatic equipment.
- 11. Establish machine to automation equipment interfaces.
- 12. Understand and follow the operational preventive maintenance system; maintain and upgrade this system as needed.
- 13. Must be able to demonstrate ability to operate powered lift truck in accordance with the power lift truck training manual.
- 14. Must be able to demonstrate ability to operate aerial lift in accordance with safe standard industry practice.
- 15. Conduct monthly and as-required inspection of the aerial lift; coordinate repairs of equipment as needed; maintain records of monthly inspections.
- 16. Responsible for certification of aerial lift operation per current industrial standards for all required employees.
- 17. Must be able to demonstrate ability to operate overhead crane in accordance with safe standard industry practice.

<sup>&</sup>lt;sup>25</sup> See GC Exh. 20, Crosby's evaluation of June 18 and the attached job description.

<sup>&</sup>lt;sup>26</sup> According to Patterson, Crosby was not evaluated in 2001. Neither side produced performance evaluations for Crosby prior to the June 18, 2002 evaluation.

<sup>&</sup>lt;sup>27</sup> Crosby's evaluation also indicated that he could not "troubleshoot as well as write and design PLC (programmable logic controls) machine logic with automated equipment monitoring," item number 16.

<sup>&</sup>lt;sup>28</sup> See GC Exh. 28. Wagner's evaluation form states that he is a skilled trades working supervisor; the attached job classification description described his position as "maintenance technician working supervisor (skilled trade)."

- 18. Responsible for housekeeping in department and in areas where department personnel are working.
- 19. Perform and manage the troubleshooting as well as write and design PLC machine logic work with automated equipment programming.
- 20. Perform and manage the design, build, and repair of fabrications as required.
- 21. Support the manufacturing operation efforts to keep a continuous flow of high quality castings through the facility and to the customer.
  - 22. Implement facilities maintenance as required.
- 23. Coordinate and supervise the activity of the department as directed by the department manager and per the department goals.
- 24. Represent the Company in the daily practical administration of Company policies and procedures.
- 25. Responsible for first-level supervision of all maintenance technicians, including, but not limited to, creating and conducting objective performance reviews in a timely manner, even administration of Company policy and procedures, and participation in all decision making activities related to reward and discipline of maintenance technicians. Also responsible for timely reporting of absenteeism and other data and updating appropriate management representatives as to the status of department personnel on a periodic and as-required basis.
- 26. Complete all paperwork and other reporting as assigned and as necessary.
- 27. Assist with vendors in sourcing parts, equipment, and services for timely repairs.
- 28. Inspect completed work for quality and completion of work ordered.
- 29. Interface with computer software in the course of daily operation of the department.
- 30. Responsible for understanding and following the standard practice instructions (SPIs) and standard operating procedures (SOPs) associated with this classification as listed in the training program.
- 31. Perform other duties as assigned in the ultimate support of manufacturing and the Company goals.

Wagner, noting that he was aware that the Company had changed its business in 2001, nonetheless stated that prior to the June 2002 review, he had never seen this particular job description and had never been given time targets to acquire skills in any prior review. <sup>29</sup> Wagner, while not completely sure, said he may not have received any performance reviews from July 2001 until the June 2002 review. Wagner conceded that the June 2002 review may have applied to the previous 6 months or, perhaps, year. According to Wagner, he had not heard of the maintenance tech classification prior to 2000, but was aware of it around 2002 ("later in the 2000s"), or so he thought.

## d. Mark Cook's May 3, 2002 performance evaluation and job description

Cook testified that he is a current employee, having worked for the Respondent for about 20 years. Cook stated that he was a die cast mechanic for 12 years; a foundry tech for 6 years; a maintenance tech for 2-1/2 years; and for the last 7 months, currently a final pack tech working on the second shift, having been laid off from his maintenance position by the Respondent on May 9, 2003. Cook said that he assumed the maintenance tech position around mid-October 2000. Cook admitted that when he first assumed his maintenance tech duties, he worked primarily on preventive maintenance assignments.

Cook stated that around May 3, 2002, he received a performance evaluation from his then supervisor, Don Torrey III. Cook said he received the third highest evaluation score and received a wage increase as a result of this interview. Cook also stated that as part of the performance review, he was shown, for the first time, a job classification description for the maintenance tech position with time targets for obtaining job skills and handwritten comments stating what skills he did not have or functions he could not do; and that he had to acquire some skills on his own time.<sup>30</sup> Cook admitted that this was his first performance review in the context of the new business.

Cook commented that he had never before been given time targets for obtaining job skills as a maintenance tech. In fact, according to Cook, he had not received a performance evaluation as a maintenance tech before this May evaluation. Cook stated the job description and comments were questionable in his mind because he was given a new job description, being told there were things he could not do and had to master by certain times, but he had never been told about the job requirements and other requirements in the first place. (Tr. 720.)<sup>31</sup> Cook conceded that he understood that the Company's change in business entailed new machinery and the job requirements for understanding the new machines were different and that he would have to know how to repair them and to get up to speed on the new machines.

### e. George Ludwig Jr.'s June 25, 2002 performance evaluation and job description

Ludwig Jr. is a current employee<sup>32</sup> at the Intermet facility and has worked for the Company for about 8 years. Ludwig Jr.

<sup>&</sup>lt;sup>29</sup> Wagner's new job description, like the others associated with the maintenance techs, contained Patterson's handwritten time targets in the left margin for each skill that he had not mastered as well as handwritten comments from Patterson stating either that Wagner could or could not perform a skill or needed improvement. Notably, Wagner received a wage increase as a result of this performance evaluation.

<sup>&</sup>lt;sup>30</sup> Cook identified GC Exh. 24 as the May 3, 2002 individual evaluation form he received from Torrey, noting his signature and Torrey's. However, Cook stated that the job description he received contained time targets and handwritten comments on it. The job description attached with this exhibit did not have the time targets and written comments. In all other respects, I would note that the job description is identical to the previously discussed description for Shembarger. I would credit Cook's testimony regarding the job description he received on May 3, 2002.

<sup>&</sup>lt;sup>31</sup> This is not a direct quote, but represents what I consider the gist of Cook's testimony.

<sup>&</sup>lt;sup>32</sup> Ludwig Jr. stated that on about May 9, 2002, he was laid off from the maintenance tech job and took a job in the final pack department. Ludwig Jr. said he could not honestly say what his current job classification is but that he works in the final pack department "in charge of the second shift," but supervised by Rick Birkhold.

said that he began working in the maintenance department around the time the Company began installing the new casting equipment. According to Ludwig Jr., Patterson approached his then supervisor, Wayne Knuth, and asked that he (Ludwig Jr.) be transferred to the first shift of the maintenance department from the machine shop to help with the reconstruction of the facility. Ludwig Jr. stated that he made the transfer from the machine shop to maintenance but was provided no training in the move.<sup>33</sup>

Ludwig Jr. stated that his first performance evaluation as a maintenance technician occurred on June 25, 2002; Patterson was the evaluating supervisor. This was his first review in the maintenance department.

Ludwig Jr. explained on the day in question, he met with Patterson who showed him an already prepared evaluation form and a job description with handwritten comments and time targets for acquiring the skills associated with enumerated duties and responsibilities of the maintenance tech job.<sup>34</sup>

Ludwig Jr. stated that he had not seen the job classification before the review and assumed that the handwritten notes came from Patterson, who explained that he would be given time to acquire the pertinent job skills. According to Ludwig Jr., he had never been given time limits to obtain skills for the job. He again noted that between assuming the maintenance tech position and this June 2002 review, he had received no (formal) training with respect to his job function. He did concede that the training he may have received consisted of on-the-job training from Patterson.<sup>35</sup>

Ludwig Jr. said that he, at that point—June 2002—had never received an increase in his wages as a maintenance tech and he received none as a consequence of the June 2002 review.

## 2. The subsequent evaluations of the five maintenance techs

In paragraph 9(d) of the complaint, the Respondent is essentially charged with issuing Cook, Crosby, Wagner, Ludwig Jr., and Shembarger evaluations unfairly critical of their performance as measured by the allegedly improperly issued job descriptions previously discussed. The evaluations in question were issued by the maintenance department supervisor, Brian Lehmkuhl, an admitted supervisor. The alleged discriminatees testified regarding their evaluations.

## a. William Shembarger's November 21, 2002 performance evaluation

Shembarger testified that his second evaluation occurred on November 21, 2002, in Patterson's office. However, on this occasion, Patterson was not present and, in his stead, his immediate supervisor, Brian Lehmkuhl, and a representative from the human resources department, Tyanna Welles, conducted the evaluation session.

Shembarger identified his evaluation<sup>36</sup> which also included the job description he received on June 27, 2002, as an attachment and noted that his evaluation was the lowest that he had ever received while employed by the Company. In fact, he noted that the rating he received—"rarely meets more than minimum requirements"—is the lowest one can get. Shembarger said he did not receive a pay increase as a result of the evaluation.

According to Shembarger, Patterson and Welles first dealt with the goals and objectives part of the evaluation form which indicated that he (Shembarger) had been given the following goals in his June review and the results of his efforts to reach them.

- 1. Complete Parker Hydraulics Training CD—90 days Incomplete, no attempt.
- 2. Complete Fanuc Robot Operations CD—90 days Incomplete, no attempt.
- 3. Read 2 books from Intermet's library and write a report on each—90 days

Bill submitted a report late on 10/1/02, cannot tell from the report if Bill read the books.

His report is a copy of page x in the preface to the book

Bill needs to read 2 more books in 60 days and write an original report on each.

4. Organize, develop a system, and maintain welding and grinder equipment in the maintenance area, as well as the supplies associated with each. Include documentation of system and training of people involved. 90 days

Incomplete, no attempt to develop a system.

Shembarger said that he took issue with these comments and told Lehmkuhl and Welles as such. For instance, Shembarger said that he disagreed with the comments that he had not completed the Parker Hydraulics and the Fanuc Robot CDs because the Company had not purchased them prior to the review. Furthermore, Lehmkuhl had told him prior to the November review that he did not know whether they would be available prior to the evaluation but that he would let him (Shembarger) know when they were. According to Shembarger, Lehmkuhl denied telling him this and the meeting turned heated, with Welles having to intervene and ask the two for calm. <sup>37</sup>

Regarding 3 (above), Shembarger noted that before the review, Lehmkuhl had simply told him to read the books and write a sentence or two to indicate he had read them. Shem-

<sup>&</sup>lt;sup>33</sup> Ludwig Jr. could not state with certainty when he started work in the maintenance department but thinks it was in 2001. He noted that when he was assigned to the machine shop, his duties included machine repair, some welding, and oiling and greasing the machinery.

<sup>&</sup>lt;sup>34</sup> Ludwig Jr. identified GC Exh. 12 as a copy of his evaluation form and his job description. The job description is identical to that of Shembarger and includes the notes and time targets.

<sup>&</sup>lt;sup>35</sup> Ludwig Jr. also stated that his father, George Ludwig Sr., Mark Cook, Crosby, Shembarger, Don Winnell, Louis Miller, and Wagner also assisted him with training on the job, mainly by answering questions and offering occasional help when he did not know how to effect a required repair.

As with the other maintenance techs previously discussed, Ludwig Jr.'s job description included handwritten comments indicating what skills/functions he could and could not do and suggested the steps he should take to improve his skills.

<sup>&</sup>lt;sup>36</sup> Shembarger's November performance evaluation is contained in GC Exh. 17.

<sup>&</sup>lt;sup>37</sup> On bottom, Shembarger says he was never given the opportunity to complete the hydraulics and robotics training CDs during worktime.

barger said he read the books and gave Lehmkuhl his summary. However, at the meeting, Lehmkuhl said that he (Shembarger) was late with his submission and, in fact, did not seem to have read the books.<sup>38</sup>

Regarding #4 above, Shembarger said a signage system for the welding and grinding equipment was discussed with Lehmkuhl between the June and November reviews, but the instructions given him were vague; nothing specific was spelled out for him to do relative to establishing any particular system, although Shembarger said that he did make a sign for the maintenance area.

Shembarger noted that the goals and objectives part of the evaluation included the following:

In addition to completing the overdue goals, Bill needs to complete the following

- 1. Complete half of the video training modules on PLC's in 60 days
- 2. Finish building a test station for flow meters. 30 days
- 3. Be able to move the robots back to home position and restore the cell back to auto in 60 days.

Shembarger stated that with respect to number 1, prior to the evaluation Lehmkuhl and he discussed the video training on the PLCs. According to Shembarger, Lehmkuhl told him that he had to complete this assignment before or after work, but not on work time. However, according to Shembarger, he was never given the opportunity to view the videos.

Regarding #3, Shembarger said that he was never given time wherein he could practice to develop robot homing skills, and he was never scheduled for testing on whether he could perform this function.<sup>39</sup>

Directing himself to the job description attached to his November review, Shembarger said that he, Lehmkuhl, and Welles discussed the handwritten portions of the skill-related duties and responsibilities section which, in the main, indicated by way of handwritten notations whether he had made progress in achieving the goals of each of the enumerated items. According to Shembarger, the discussion focused on the time targets for which he was past due in terms of skills acquisition. Shembarger said that he disagreed with some of the comments either because he thought he had complied with or met the performance requirement or because he was not given opportunities to train to accomplish a specific goal. 41

Shembarger conceded that he had been given companysponsored training on several occasions, namely the Prince training at Prince Die Cast Co., Kendall Supply, and Fanuc Robot training in Detroit, Michigan. He also noted that on-thejob training occurred continuously at the plant through fellow maintenance techs and Patterson and another employee, Rod Penley. Shembarger also admitted that it was his responsibility to meet the goals in his performance reviews.

### b. Robert Crosby's October 17, 2002 performance evaluation

Crosby stated that he participated in a performance evaluation session with his supervisor, Lehmkuhl, in the front office area of the plant. Crosby identified the October 17, 2002 evaluation form he signed and the attached job classification description presented to him in the review. According to Crosby, this evaluation was an unusual review for him, mainly because it was the lowest he had ever received from the Company, especially in the area covering his knowledge and skills associated with the maintenance tech job; his rating was the lowest any employee could receive.

Crosby was asked by the General Counsel about the training he had received between the June evaluation and the October review. Directing himself to the job classification description and Lehmkuhl's handwritten notations to the enumerated skill-related duties and responsibilities, Crosby stated that he had received little or no training in the respective areas—specifically items 3, 4, 10, 11, 12, 16, and 20—in which Lehmkuhl determined that he had either made no progress or could not perform at all.

According to Crosby, with respect to Lehmkuhl's comment that he needed to improve his troubleshooting skills associated with item 3, training CDs were discussed with Lehmkuhl at the November review. Lehmkuhl said that he (Crosby) would have to view them on his own time. Regarding Lehmkuhl's remarks in item 12 that Crosby needed to learn the MP 2 system that was part of the Company's preventive maintenance system, Crosby said that he never was taught what the system was, let alone entailed.

Crosby also noted that while he was given credit for being possessed of good welding and fabrication skills in the evaluation, this was only a qualified crediting of his performance in that he was determined to be in need of "work" in the design area so as to take an idea from concept to a finished piece. Crosby said that he discussed the matter with Lehmkuhl at the review, pointing out to him that he had fabricated a special bracket for the machinery that resulted in reduced downtime. According to Crosby, Lehmkuhl had no reaction to his point and said nothing one way or the other.

## c. Ronald Wagner's December 17, 2002 performance evaluation

Wagner testified that his immediate supervisor, Lehmkuhl, issued his December 17 performance evaluation which included the attached job classification description annotated with

<sup>&</sup>lt;sup>38</sup> According to Shembarger, the books were not skill related in nature; rather, they dealt with the topic of change in a person's life.

<sup>&</sup>lt;sup>39</sup> Shembarger did not offer any testimony regarding number 2 above regarding building a test station for flow meters.

<sup>&</sup>lt;sup>40</sup> Of the 22 enumerated items, Shembarger, according to the notes, needed to improve or had made no progress with respect to 11 of the items.

items.

<sup>41</sup> For instance, Shembarger felt that he had complied with enumerated item number 1 regarding performance of duties associated with the standard operating procedures (SOPs) and instructions (SPIs) and had followed what he thought were Lehmkuhl's instructions. Shembarger said on the latter point that he was not given any opportunity to complete the training CDs and videos and he was given no training on the MP 2 work order tracking system.

<sup>&</sup>lt;sup>42</sup> See GC Exh. 21, Crosby's performance evaluation and attached job description with handwritten comments and the time targets for acquiring the skills associated with the enumerated items.

Lehmkuhl's comments about his performance and progress in acquiring the enumerated skills and responsibilities. Wagner stated that Lehmkuhl's evaluation of him was the worst rating that he had ever received; a ranking of "rarely meets more than minimum requirements" was the lowest rating an employee can get. Wagner also noted that as reflected in this evaluation, he no longer occupied the position of "working supervisor," a change that took place in the early fall of 2002. Accordingly, he became strictly a maintenance technician and his "new" classification was maintenance tech. Wagner noted that he received no wage increase as a result of this December evaluation.

Wagner said that in the period between his June evaluation and the December review, his main responsibilities were servicing the furnaces, essentially, keeping them on line, maintaining proper temperature levels, and making sure the other machinery was running properly. According to Wagner, he was not given any formal training consistent with his new job description.<sup>44</sup>

Wagner was specifically directed to (for him) the new job description and queried by the General Counsel regarding any training he received in the pertinent enumerated skills areas that Lehmkuhl had indicated he either could not do or had to complete. Wagner stated that between the June evaluation and the current review for December, he had received no formal training with respect to items 3, 6, 7, 8, and 20.

## d. Mark Cook's September 30, 2002 performance evaluation

Cook stated that he was evaluated by Lehmkuhl on September 30 and received the lowest rating of his career with the Company with regard to his knowledge and skills as a maintenance tech, 46 and he received no increase in his wages as a result.

Cook said that prior to the September review, he had received no formal training in the maintenance tech position. Cook stated that he discussed some of the items—the skill areas—included with this evaluation with Lehmkuhl. For instance with regard to item 3 and the comments dealing with the responsibility to view the hydraulic CDs within 60 days, Cook said that Lehmkuhl said he was supposed to accomplish this on his own time. Similarly with respect to item 7, Cook said that Lehmkuhl told him he had to view the PLC training course videos on his own time within 6 months in order to meet the requirements of being able to "read electrical and hydraulic schematics and ladder logic to solve machine problems" as called for by item 7.

Regarding item 10, which required a maintenance tech to be able to "set up and program automatic equipment" within 18 months, Cook said he had been given no prior formal training by the Company and Lehmkuhl did not discuss with him how the Company was going to assist him in developing this skill, particularly, by giving him an opportunity to practice working with the robots. Cook also said that he had no time during the day to complete any training. He admitted that he did receive some on-the-job training from coworkers and supervisors.

Cook acknowledged that before working as a maintenance tech in 2000, he had worked only on the old die cast machinery. Accordingly, he was well aware that the new machines and process required different skills and that getting up to speed would be necessary for all techs; management had made that clear. However, Cook said that once he was told he had to acquire new skills under the new job description, he was not given ample opportunity by the Company to acquire the new skills. Cook said that he never turned down any opportunity to learn new skills. Cook acknowledged that the job requirements for understanding the new machines were different and that everyone had to get up to speed on them through a learning process.

<sup>&</sup>lt;sup>43</sup> Wagner's December 2002 evaluation, and the attached job classification with time targets and handwritten notations, is contained in GC Exh. 29. Notably, Wagner's new job classification is the standard 22-element maintenance tech job description previously discussed. Wagner stated that the Company hired a new person to be the working supervisor for the third shift. Wagner said he discussed this with Patterson who told him this change would help him improve his skills. While not charged as such, this change in Wagner's job was unilaterally made by the Respondent.

<sup>&</sup>lt;sup>44</sup> Wagner, however, acknowledged that before the installation of the new equipment, he had received training on the old Prince vertical die cast machine and in June 2000, he attended a 1-day training course on the aforementioned PCL system. Wagner also noted that he was scheduled to attend the Fanuc robotics course in March 2002, but opted not to go because he did not want to attend sessions with a new employee. The Company was supposed to reschedule for him but did not.

<sup>&</sup>lt;sup>45</sup> The specific areas and Lehmkuhl's comments and time targets are as follows:

<sup>3.</sup> Troubleshoot, replace, and repair pneumatic, electrical, hydraulic, and mechanical equipment. Complete Parker Hydraulics Training CD—60 days.

Complete Fanuc Robotics Training CD—60 days.

Completion of training CDs will help improve skills to aid in job performance.

Wagner added that he was never even asked to review the CDs associated with this area.

Install and maintain automation equipment to support the manufacturing operation.

Cannot do, as first steps: Complete Fanuc Robotics CD—60 days. Be able to home robot, restore cell to auto—60 days.

<sup>7.</sup> Read electrical and hydraulic schematics and ladder logic to solve machine problems. Demonstrate knowledge over the course of the next 60 days to use schematics to solve machine problems.

<sup>8.</sup> Write ladder logic for machines—19 months—Cannot do.

Interface with computer software in the course of completing daily assignments.

<sup>7</sup> month goal—Be able to hook up laptop computer and solve a problem with its use.

<sup>60</sup> day goal—Be able to home robots and restore the cell to auto.

<sup>&</sup>lt;sup>46</sup> Cook identified his September 30 evaluation and the attached job classification description handwritten (printed) notations and time targets. Cook said that he refused to sign the evaluation. See GC Exh. 25. Cook's rating was "rarely meets more than minimum requirements," the lowest rating. Cook believed the handwritten notations were in the hand of a supervisor, Dan Torrey.

## e. George Ludwig Jr.'s December 2, 2002 performance evaluation

Ludwig Jr. said that he received his second performance evaluation as a maintenance tech under the new job description on December 2, 2002; Lehmkuhl issued this evaluation and personally reviewed it with him.<sup>47</sup>

Ludwig Jr. noted that sometime between May and December 2002, the Company had set up an in-plant training center to allow employees to view the compact disk training materials (on hydraulics and robotics) and Lehmkuhl told him that he could now come in any time before work and review them.

The General Counsel directed Ludwig Jr. to the goals and objectives section of the December review and asked him to comment on the specific goals and objections enumerated. Ludwig Jr. said that item 1 of the goals and objectives stated that he was to improve on items 3, 7, and 17 of the 22 skills-related duties and responsibilities set out in his job description. Lehmkuhl noted in the evaluation that Ludwig Jr. had not completed this goal and that he had made "no attempt to complete to #3; no progress on #7 and has made some progress on #17 as far as how to weld elements."

Ludwig Jr. said that the Company had not provided him any (formal) training between his last (June 2002) review, and the December review, with respect to item #3. 48

With regard to element 7,<sup>49</sup> Ludwig Jr. said the Company had provided him no formal training between the last review and the December appraisal.

The General Counsel also queried Ludwig Jr. about #2 of the goals and objectives which, as noted by Lehmkuhl, required Ludwig Jr. to review each SPI (standard practice instruction) and policy on the training requirements for a maintenance tech and demonstrate understanding of them. Noting that Lehmkuhl's written comments indicated that he had not provided to management any documentation (as required by his last review) that he understood the SPIs and policies associated with his job, Ludwig Jr. stated he did not know that actual documentation had to be turned in. Furthermore, Ludwig Jr. said that he had basically only a 1-month period while "babysitting two machines" to squeeze in time to review the SPIs and he did so; however, he conceded that he did not submit any documentation as proof to management.

The General Counsel queried Ludwig Jr. about the "special assignment" portion of the evaluation which, among other requirements, instructed that Ludwig Jr. had to complete half of the video training on the PLCs in the Company's library.

Ludwig Jr. said that there was a video or two in the library and that he would check these out to review at home.

Ludwig Jr. conceded that he did receive some on-the-job training from Patterson mainly, but also from other employees who helped him on specific problems.<sup>50</sup>

Ludwig Jr. noted that as a general matter he was not assigned to work with another maintenance tech and received his assignments through written work orders. As a practical matter, according to Ludwig Jr., he was only assisted by another person on the occasions when he could not effect a repair on his own because he was unfamiliar with the corrective measures required. Ludwig Jr. reckoned that he worked by himself around one-half the time.

## f. A postscript: The final performance evaluation of the maintenance techs

It should be noted that some of the five alleged discriminatees received what turned out to be their final performance evaluations as maintenance techs. Shembarger received his on January 29, 2003;<sup>51</sup> Crosby was to receive his sometime in January 2003 but did not;<sup>52</sup> Wagner was last evaluated on March 20, 2003; Cook did not receive any evaluations after his December 2002 review; and Ludwig Jr. received his final review on February 12, 2003. These reviews and/or the absence of reviews of the alleged discriminatees are not charged as violations in the complaint.

The General Counsel also called Don Torrey<sup>53</sup> the former supervisor of the maintenance techs, to corroborate the testimony of the five alleged discriminatees. Torrey said that his duties were as a maintenance system engineer on the first shift. According to Torrey, his duties included setting up preventive maintenance plans and general oversight of maintenance at the plant, scheduling assignments and projects for the maintenance staff, and reviewing maintenance employee performance.

Torrey was aware of the union campaign that occurred during his tenure and stated that Shembarger and Crosby asked him if he was an hourly or salaried employee in the context of the campaign on the first day he came back to work. According to Torrey, it was generally known that the maintenance workers

<sup>&</sup>lt;sup>47</sup> Ludwig Jr.'s December evaluation and accompanying job description with the now standard time targets and Lehmkuhl's handwritten notations is contained in GC Exh. 13. Ludwig Jr. received the lowest rating possible as a result of this review and did not get a wage increase. Ludwig Jr. was unsure but thought that Patterson also may have sat in on the review session.

<sup>&</sup>lt;sup>48</sup> As a reminder, element #3 of the job description requires the maintenance tech to be able to troubleshoot, replace and repair pneumatic, electrical, hydraulic, and mechanical equipment. Lehmkuhl gave him 7 months in December to complete the goal.

<sup>&</sup>lt;sup>49</sup> Item 7 requires the maintenance tech to read electrical and hydraulic schematics and ladder logic to solve machine problems. Ludwig Jr. was given 7 months to complete the goal in the December review.

<sup>&</sup>lt;sup>50</sup> Ludwig Jr. said that his father, Henry Ludwig Sr., Cook, Crosby, Shembarger, Wagner, Louis Miller, and Don Winnell—all working in the maintenance department—helped him (on the job) with various maintenance problems he encountered, mainly by answering his questions. According to Ludwig Jr., none provided him with what he considered true training. Ludwig Jr. could not recall whether a supervisor (Don Torrey) trained him in preventive maintenance work and procedures

<sup>&</sup>lt;sup>51</sup> Shembarger's January 29, 2003 evaluation is contained in GC Exh. 18. He received once more the lowest rating possible. The maintenance job description was not attached to this evaluation.

<sup>&</sup>lt;sup>52</sup> Crosby stated that he had no review after the December 2002 review. According to Crosby, Lehmkuhl told him his performance would not be reviewed until the Company had time to provide him opportunities to train to acquire the required skills.

<sup>&</sup>lt;sup>53</sup> Torrey no longer works for the Respondent, having quit because of health problems in July 2002. Torrey said that he worked for the Company from September 1997 until June 2001, and then November 2001 through July 2002. Torrey's testimony, though credible, was of limited value in my view.

and another employee, Tom Turney, were responsible (in particular) for starting the campaign.<sup>54</sup>

Torrey said that he observed the on-the-job performance of Cook, Crosby, Ludwig Jr., Shembarger, and Wagner, and noted no change in the quality of their work; they seemed to work to the best of their ability, at least in terms of the work they did for him. Torrey said that he told them at the time that his job required him to observe their work, ensure the completion of paperwork, and that all preventive maintenance work was done.

Torrey said that he consulted with Patterson regularly on the quality of the work of the maintenance techs, going through their work lists for completion of assignments and the like. Torrey said that generally there were no problems with them regarding the nature of the work scheduled but the amount of the work completed was at issue. As far as he was concerned, not all problems were of the repetitive types; most were not. Torrey thought that the nonrepetitive ones took the techs longer to repair. However, he had no problems with the quality of the techs' work.

Torrey stated that while he was with the Company, employees were never required to obtain training to acquire workrelated skills on their own time, though Torrey admitted that he once instructed Cook to read two library books and write reports on them on his own time.

Torrey was asked by the General Counsel to identify and comment upon a copy of the new maintenance tech job description that did not contain timeframes or other comments.<sup>55</sup>

Torrey stated that of the maintenance techs he supervised—Cook, Phillip Lee, Valer Pascanu, and Ludwig Jr.—possibly a few of them (not identified) could set up the robots or otherwise used the automated equipment by training themselves through the videos; but not all could. With respect to some of the applications for the automated equipment, Torrey opined that no employee could teach himself the necessary skills.

Torrey stated he took the Fanuc robot training and thought it was an effective training course which would enable one to train another worker. As a general matter, according to Torrey, the maintenance techs were given mainly hands-on training, that is, Patterson would assist the techs and show them how to fix a problem; workers were then expected to know how to perform the repair the next time. <sup>56</sup>

### 3. The layoffs of the maintenance techs

As a preliminary matter, it should be noted that there is no dispute that the four of the five alleged discriminatees were in fact laid off from their maintenance tech jobs—Shembarger on about May 9, 2003; Crosby on about June 17, 2003; Cook on or about May 9, 2003; and Ludwig Jr. on about May 9, 2003. As noted, Wagner was not laid off and currently works as a maintenance tech. As will be clear, all of the alleged discriminatees were offered other positions at the Company; some accepted these, others did not. The complaint alleges violations of the Act only with respect to the layoffs of the respective workers from their maintenance tech jobs on specific dates. Each of the laid-off alleged discriminatees testified about the circumstances surrounding his layoff.

#### a. William Shembarger's layoff

Shembarger said that on May 8, 2003, he was told of his layoff by Patterson in the office of the recently hired human resources director, Mitchell Maze, who was also present. According to Shembarger, he was told that things were slow and he would have to be laid off as a maintenance tech. However, he was offered a job on the final pack line at \$13 per hour. Shembarger said that at the time he was making \$18.37 in the maintenance department and, moreover, the final pack line was viewed as the "hellhole" of the shop because of the repetitive nature of the work and the incessant beating, pounding, and filing of parts. So he refused the offer to go there. Shembarger inquired whether there were other opportunities available, specifically a job involving driving the lift truck. Shembarger said Patterson told him that his (Shembarger's) skills with the truck were not up to speed and that there were other employees with more seniority driving the lift trucks at the time.<sup>57</sup> Shembarger stated that he is currently employed with another company and making as much or more than he was paid at Intermet.

#### b. Robert Crosby's layoff

Crosby testified that on June 17, 2002, he was asked to report to Patterson's office where he met with him and Maze. Patterson told him that regrettably due to economics, there had to be another round of layoffs and that he was to be laid off. Crosby said that he asked Patterson whether the layoffs were being done on the basis of shop or plant seniority. According to Crosby, Patterson said the layoffs were going by job descriptions. The Patterson also offered him the choice of taking a voluntary layoff or a job in the final pack area. However, Crosby stated that Patterson knew that he would not accept a final pack assignment based on Crosby's expressed dislike of the job when he was temporarily assigned there on prior occasions.

<sup>&</sup>lt;sup>54</sup> Torrey said that the maintenance workers and Turney let it be known that they were the people handing out union literature and everything else connected with the campaign. (Tr. 358.)

<sup>&</sup>lt;sup>55</sup> GC Exh. 46 is basically an unedited copy of the new job description for the maintenance techs. Torrey acknowledged that he evaluated Mark Cook based on this job description.

<sup>&</sup>lt;sup>56</sup> Torrey said that his own training was gained in this 'hands on' fashion; he basically learned from Patterson and Barry and took no maintenance related courses outside of work. Torrey also noted that Patterson worked all the shifts and helped techs on shifts other than the first shift. Torrey also stated he thought that timeframes for accomplishing skills were appropriate and he would have included these for example in item 2 of the maintenance tech job description which called for providing and managing preventive services to equipment and facilities. (Tr. 1360.)

<sup>&</sup>lt;sup>57</sup> Shembarger then had a current lift truck (forklift) license as well as an aerial boom operator's license (see GC Exh. 19). Shembarger noted that at the time of his layoff, he saw temporary workers operating the lift truck on his shift—the third. On cross-examination, Shembarger changed his testimony and said that Patterson did not really say anything about his qualifications as a forklift driver. (Tr. 590.)

<sup>&</sup>lt;sup>58</sup> Crosby was of the view that he had more seniority than other employees and by June 17, 2002, he had the most seniority in the maintenance department, being the first to transfer to the new maintenance tech job.

Crosby said that he told Patterson that the final pack work was demeaning for a skilled tradesman.

Crosby noted that at the time he was licensed to drive a lift truck. He also noted that around May 2003, when the initial layoffs took place, he saw workers doing typical maintenance work. Crosby also noted that another maintenance tech, Valer Pascanu, was given a change in his job title—manufacturing engineering tech to maintenance engineer—shortly before the first layoff. However, after the layoff, Crosby stated that he saw Pascanu performing maintenance functions, that is, doing preventive maintenance work (PMs) and working on the metal delivery shuttles. Crosby also noted that at this time he saw Lehmkuhl, Patterson, and another robotics tech, Robert Potter, doing maintenance-type work after the layoffs. Crosby also recalled that the Saturday before his layoff, he had worked 8 hours of overtime with Lehmkuhl. 60

Crosby said that sometime after his layoff notification, he privately spoke to Lehmkuhl in the maintenance department, asking why he was being laid off in the face of the Company's hiring two electrical engineers to do maintenance work. 61 According to Crosby, Lehmkuhl simply turned way and said nothing.

#### c. Mark Cook's layoff

Cook said that he received his layoff notification from Patterson and Maze in the human resources office on May 8, 2003. According to Cook, Patterson basically said his job would be eliminated and that he could either apply for unemployment benefits or take a job in the final pack line which would entail a cut in pay of about 10 cents per hour. Cook said that he told them that he would prefer going back to the foundry or running a casting machine. Patterson, however, said that he had insufficient training for these jobs. Cook said in spite of the final pack line being what he called a hard labor job, he ultimately accepted this job.

Cook said that he had worked with Valer Pascanu, a fellow maintenance tech, and that he (Cook) was more senior to Pascanu in the maintenance department. Cook recalled having observed Pascanu, whose title had changed about a week before the layoff, doing typical maintenance work—e.g., welding elements on crucibles, using a cutting torch, and installing pumps—after his layoff.<sup>63</sup>

#### d. George Ludwig Jr.'s layoff

Ludwig Jr. testified that he was called to the human resources offices on May 8, 2003, and met with Patterson and Maze. According to Ludwig Jr., Patterson informed him that because sales were low, in fact a lot lower than expected, certain cuts would be undertaken by the Company. Patterson then offered him the option of taking a voluntary layoff or transferring to the first shift of the final pack line. Patterson gave him 24 hours to decide. Ludwig Jr. said that he told Patterson he would have to consult with his wife because the layoff option could mean a loss of benefits for his wife and three children.

Ludwig Jr. ultimately accepted the final pack job, which paid 1-cent less per hour than his maintenance tech job. Ludwig Jr. said he was told that he would be displacing a temporary worker on the first shift. Ludwig Jr. stated that inasmuch as he had been working on the second shift for 7-1/2 years, he asked Maze why he could not replace a temporary worker on second shift. According to Ludwig Jr., Maze said that this was not then possible but the Company would explore this in a couple of weeks. Around May 15, according to Ludwig Jr., Maze informed him that the Company needed someone to serve in a lead capacity on the second shift in final pack, and was he interested. Ludwig Jr. stated that because of child care concerns, he accepted the offer and continues today to work in this job. 64

Based on the foregoing, the General Counsel essentially contends that the Respondent's issuance of the new maintenance tech job descriptions, the imposition of new and onerous job requirements on the techs, the requirement of their securing training on nonworking time and without compensation, their poor and unfair evaluations, and their ultimate layoffs were actions taken by the Company emanating out of unlawful motive and animus toward the Union and its supporters. He submits that these actions were designed by the Respondent to retaliate against the maintenance techs for their union support and to discourage further union support at the Stevensville plant. The General Counsel's argument will be dealt with more at length later herein. We turn in the meantime to the Respondent's responses to these charges.

### The Respondent's Defense to the Charges Concerning the Maintenance Techs

The Respondent called principally Patterson, Lehmkuhl, Barry, Charles Rytlewski, its finance manager, and its human resources manager, Maze, to meet the allegations regarding the Respondent's treatment of the maintenance techs.

Patterson testified that he has been employed with the Respondent since 1996 and currently occupies the position of facilities manager. In that capacity, Patterson said that he was responsible for the creation of the maintenance tech position in 1998. According to Patterson, the position was created because Shembarger and Crosby, then occupying millwrights' positions, wanted to make more money but were at the top of their pay

<sup>&</sup>lt;sup>59</sup> According to Crosby, Pascanu had the second lowest seniority in the maintenance department. Pascanu was promoted to the new position on April 14, 2003. See R. Exh. 127.

<sup>&</sup>lt;sup>60</sup> Crosby said that after the initial layoffs of the maintenance techs, Lehmkuhl worked with him, assisting him with his work assignments about 90 percent of the time, but only with respect to things Crosby could not do himself.

<sup>&</sup>lt;sup>61</sup> The two employees were Ryan Lee and Brian Stone, who were both hired on June 2, 2003, as electrical controls' technicians. Notably, Stone was terminated on July 23, and Lee on December 19, 2003.

<sup>&</sup>lt;sup>62</sup> Cook stated that his lift truck and aerial boom operator's licenses were also valid at the time of his layoff. (See GC Exh. 27.) It is not clear how Cook's possession of these licenses would meet the training requirements of one who operated a casting machine. As will later become evident, forklifts are used in the foundry department.

<sup>&</sup>lt;sup>63</sup> Cook admitted that after May 2003, he worked the second shift and Pascanu worked the first shift. He did not explain, nor was he

asked, how he was able to observe Pascanu doing the maintenance work when they worked different shifts. Notably, however, the record testimony reflects that there was an overlap of the two shifts.

<sup>&</sup>lt;sup>64</sup> Ludwig Jr. transferred to the finishing tech position on about May 12, 2003, and was promoted to lead finishing tech on September 29, 2003. See R. Exh. 127.

grades as millwrights. Patterson said that he consulted with the plant manager, Joe Barry, who coincidentally wanted to introduce more automation to the production process which would require both a new manufacturing process and machinery. Concomitantly, according to Patterson, any job associated with the repair and maintenance functions of the new machinery per force would have to be altered or adjusted.

Patterson said that as a result, in 1998, Shembarger, Crosby, and Wagner were made maintenance techs and received additional pay as a result. According to Patterson, he also informed them that he was changing their current job descriptions and reviewed the changes with them.<sup>65</sup> According to Patterson, Crosby, Shembarger, and Wagner, neither of whom then possessed the skills called for in the new tech position, all agreed to work toward acquiring the required skills.

Patterson stated that in January 2001, the Company embarked on the new business and by September 2001, the Company was in full production under the new process which entailed fully automated casting machines as well as the auxiliary machinery that supported them. Patterson noted that in 1998, when he created the maintenance tech position, the Company was using 1970's technology and machinery. In 2002, the Company was using state-of-the-art technology and equipment which required more in the way of electronic controls and automated equipment. According to Patterson, these machines required of the maintenance techs more in-depth knowledge of electronics and automation (computer driven and controlled) skills.

Patterson said that by 2002, the Company had converted all the other positions relating to the maintenance function to the singular maintenance tech position. Thus, by 2002, the mill-wright job and even eventually the support trades maintenance working supervisor position were eliminated.

Patterson stated that he was aware of the charges alleging that the Company had imposed new and onerous conditions on the employment of the alleged discriminatees in May and June 2002, as well as allegedly requiring them to undergo training and performing other work on their own time because of their union activity or involvement and support. Patterson denied this. Patterson also denied the charge that any maintenance techs were laid off because of the Union or their support of or involvement with the Union.

Patterson acknowledged preparing and issuing Shembarger's June 27, 2002 review (and the annotated job description) but stated this review had little relation to any prior reviews because Shembarger was being evaluated in June 2002 solely in the context of the new business and equipment.

Patterson said that in the review session, he went over the items line by line, identifying and discussing the areas where Shembarger needed improvement. Contrary to Shembarger, Patterson stated that he did not feel that Shembarger was given

lots of extra duties and in that regard, the required reading of two books was the only extra duty prior to 2002. He acknowledged that no maintenance employee had been required to read specific books. 66 Patterson conceded that he did not inform Shembarger prior to the review that he needed improvement in a number of areas and that there was additional training he would need. Patterson, while denying that Shembarger's job description and evaluation were based on anything involving his union activities, he noted that the interview was very emotional and that Shembarger was very upset.<sup>67</sup> Patterson said he tried to reassure Shembarger that the evaluation was merely about business and the maintenance department was viewed by management as not performing well.<sup>68</sup> Patterson said that he told Shembarger that everyone had to improve individually so that the plant and production improved. According to Patterson, Shembarger himself confessed that he had not made improvements in covered areas but that he was willing to work on them to gain the necessary skills.

Patterson directed himself to Shembarger's testimony regarding the training issue. Patterson said that Shembarger's testimony that he received no training as to item 4<sup>69</sup> of his June 2002 evaluation was untrue.

Patterson related that in 2001, when the new equipment was being installed by the manufacturer, management encouraged employees to get involved in the installation, to work with the manufacturer's installation technicians so as to familiarize themselves with the new equipment. (Patterson seemed to be saying that Shembarger did not avail himself of an early opportunity to learn about the equipment while it was being installed.)

Patterson also said that Shembarger, contrary to his testimony, did receive training on the requirements of item 7 of the job description, which involved reading electrical and hydraulic schematics and ladder logic. He explained that Shembarger worked for many years with a skilled trades support supervisor who was very skilled in electrical functions and reading schematics; and, in this fashion, training opportunities presented themselves weekly if not daily for him. To Patterson said that he

<sup>&</sup>lt;sup>65</sup> Patterson identified the maintenance tech position description he created in May 1998. See R. Exh. 85. Notably, his position description contains 14 essential duties and responsibilities, as opposed to the 22 of the job descriptions Patterson issued to the maintenance techs in the summer of 2002. Patterson basically stated that this was a new job for all intents and purposes.

<sup>&</sup>lt;sup>66</sup> Notably, other employees evidently were required by the Company to read motivation books prior to 2002. For instance, employee Lenora Richardson wrote a book report on February 8, 2001 (R. Exh. 47), as did employee Mary Brotherton on May 30, 2001 (R. Exh. 44), employee Lisa Cogwell on January 29, 2001 (R. Exh. 47), and employee Tim Dunne (R. Exh. 42). According to Patterson, he knew that Shembarger considered reading the two books as "extra duties."

<sup>&</sup>lt;sup>67</sup> Patterson volunteered that he and Shembarger had enjoyed a very close working relationship and that Shembarger seemed to feel that he was being personally attacked.

<sup>&</sup>lt;sup>68</sup> Patterson also noted that at the Company's monthly business operations systems (BOS) meetings of plant managers with corporate managers, he was advised of maintenance's poor performance, especially in the area of repetitive repairs.

<sup>&</sup>lt;sup>69</sup> Item 4 of the 22, one recalls, relates to the installation and upgrading of the electrical, hydraulic, and electronic equipment, etc.

<sup>&</sup>lt;sup>70</sup> Patterson suggested that the supervisor in question, Don Winnell, must have given Shembarger ample opportunity to acquire this skill on the job because Patterson and Winnell read schematics "plenty of times" in the old business and whenever he (Patterson) worked on a problem in the new business, he reads a schematic. Implicit in his

also worked with Shembarger on occasion, in spite of Shembarger's working the third shift and his working on the first, and thereby provided training opportunities to him. Patterson also noted that Shembarger was incorrect in saying that he did not receive training in writing ladder logic (in item 7).

According to Patterson, in 1998, Shembarger participated in a company-sponsored computer training course with an off-premises vendor—Kendall. Also, Patterson stated that he also set up a laptop computer in the maintenance department with the (PLC) ladder logic program running so that the techs could practice with the ladder logic in their spare time. Patterson believed that Shembarger and all of the techs would have had time to work with the ladder logic programs and schematics manuals.

Patterson turned to item 10 of Shembarger's new job description dealing with the techs' responsibility for setting up and programming automatic equipment and stated that Shembarger had received training in this area, contrary to his testimony. Patterson said that Shembarger, in addition to being sent to the Fanuc robotics training course, a 4-1/2 day offsite course which included classroom and practical training on the robots being installed in the plant, he was also encouraged to get involved with the robot manufacturer's technicians installing the equipment in the plant; <sup>72</sup> Shembarger also was given an opportunity to attend the Kendall training.

Patterson stated that item 11 of the job description requires the tech to be able to establish machine to automation equipment interfaces. Patterson noted that contrary to Shembarger's testimony that he had received no training in this area, he had indeed received training in the installation phase on the PLC programming, an important part of the machine/automation equipment interfaces.<sup>73</sup>

Regarding item 16 which required the maintenance tech to troubleshoot, write, and design PLC machine logic, Patterson conceded that this requires some advanced knowledge and that Shembarger did not receive training, formal or otherwise, in this area. However, according to Patterson, Shembarger had opportunities to work on this skill, and he gave Shembarger a year to acquire this skill.<sup>74</sup>

Turning to item 20, which required the maintenance tech to be able to interface with computer software in the course of completing daily assignments, Patterson, expressing incredulity over Shembarger's claim of receiving no training in this area,

testimony, Patterson seemed to be saying that Shembarger received or should have received training on item 7.

said that all tech worker orders and preventive maintenance orders are generated from the Company's MP 2 system.<sup>75</sup>

Patterson noted that Shembarger did not get a wage increase as a result of his June 2002 evaluation but was given a rating indicating that he performed at the normal or average contributor level, a middle ground rating in the Company's performance rating scheme.

Patterson then turned to Crosby's June 18, 2002 evaluation and attached job description, which he acknowledged was prepared and issued by him. Patterson denied any connection between the evaluation and the new job description and Crosby's union activities; also, in his view, there were no new and onerous conditions placed on Crosby's employment; and no requirements for him to undergo training and perform other work on his own time without compensation.

Noting that the June evaluation for Crosby resulted in his not receiving a wage increase, Patterson stated that Crosby was at the top of his pay grade and could not receive an increase at that time. Patterson also noted that as with Shembarger, Crosby's prior evaluations had no bearing on this one because, in June 2002, Crosby was for the first time being evaluated on his performance in the new business.

Patterson believed that Crosby's testimony that he had not received any training in certain areas of the new job description was not true. According to Patterson, he himself or other employees provided on-the-job training to Crosby with respect to items 4, 7, and 8, and that at the time the training CDs and videos were then available to assist Crosby in acquiring these skills. Patterson also viewed Crosby's denial of training on item 20 as untrue because he received on-the-job training in terms of being able to "interface with computer software in the course of completing daily assignments."

Patterson acknowledged preparing and issuing Wagner's June 26, 2002 evaluation and his new job description (the skilled trades working supervisor). Patterson again stated that the evaluation and the job description were predicated on the new business and had no bearing on any prior reviews, since those were based on his performance in the old business. Patterson was aware of the charges, including those regarding the Company's alleged imposition of new and onerous conditions and Wagner's employment because of Wagner's union activities, but denied any connection of one with the other.<sup>78</sup> (It

Notably, Patterson, in describing Shembarger's training in ladder logic, essentially testified to what he (Patterson) did, e.g., constantly working on the laptop's ladder logic as opposed to what Shembarger did to augment his skills. Patterson noted that the laptop was stolen from the shop but did not say when this happened.

<sup>&</sup>lt;sup>72</sup> Patterson did not provide a specific timeframe for Shembarger's participation in the robotics training course but according to requisition documents, the Company paid \$14,499 in December 2000 for a training package associated with the Fanuc robotics installation. (See R. Exh. 87.)

<sup>87.)
&</sup>lt;sup>73</sup> Notably, Patterson's handwritten comment for item 11 in the job description says that "Bill cannot perform this duty."

<sup>&</sup>lt;sup>74</sup> Patterson's' notation for item 16 indicates that "Bill cannot perform this duty."

<sup>&</sup>lt;sup>75</sup> In spite of Patterson's disbelief in Shembarger's claim of having received no training, he noted on Shembarger's job description, inter alia, that he needed to understand and work with the MP 2 system. He gave Shembarger 1 year to acquire this skill.

<sup>&</sup>lt;sup>76</sup> Notably, the PLC (ladder logic) videos were not purchased by the Respondent until August 17, 2002 (see R. Exh. 88); however, the Parker hydraulics, and as previously noted, the Fanuc robotics training, materials were purchased as a package in December 2000. It is significant for understanding Patterson's view on training that he considered on-the-job training more valuable than classroom training.

<sup>&</sup>lt;sup>77</sup> Patterson's notes for item 20 indicate that Crosby only had limited ability to perform this function, and that he had 1 year to demonstrate basic PC skills for this. (See GC Exh. 20, p. 4.)

<sup>&</sup>lt;sup>78</sup> In denying the allegation of a connection of the new job description to Wagner's union activities, Patterson did not specifically deny that the description posed new and onerous conditions and the other requirements as charged. However, it is clear that with respect to this

should be noted that Wagner received an increase in wages as a result of Patterson's review.)

Patterson disputed Wagner's testimony that he had received no training with respect to the skills associated with the new job description. Specifically, Patterson said that with respect to trouble shooting, repairing pneumatic, electric, and hydraulic equipment (item 7 of the job description) contrary to Wagner, that the (Parker) hydraulics CDs were available to everyone in the plant. Also, there were daily on-the-job training opportunities for Wagner because during the startup phase, the new equipment experienced problems. Patterson said that additionally, although Wagner worked the third shift, he (Patterson) had opportunities to work with him also.<sup>79</sup>

Regarding Cook, Patterson stated that he transferred into the maintenance department and was given his first maintenance tech evaluation and job description in May 2002. Patterson said, however, he did not evaluate him nor did he make any notes on his job description. Basically, according to Patterson, Cook was a recent transfer to the maintenance department and possessed at the time primarily skills in preventive maintenance work.

Patterson said that Cook had asked to be transferred to the second shift and was told by management that troubleshooting and the entire spectrum of maintenance tech duties would be required capabilities on his part; he would have to perform all of the requisite duties and responsibilities of a maintenance tech. Don Torrey, Cook's supervisor at the time, issued the evaluation; Torrey was mainly responsible for the preventive maintenance system at the plant. According to Patterson, Torrey's review of Cook, which ranked him as a normal contributor, resulted in a wage increase but was based on his performance in departments other than maintenance.

Patterson turned to his evaluation of Ludwig Jr. According to Patterson, Ludwig Jr. had asked him for a transfer from the finishing department to the maintenance department's second shift because of his child care concerns. Patterson said that he told Ludwig Jr. that if he were to transfer, he would have to start doing more of the trouble shooting and repair functions associated with the maintenance tech job, not just merely preventive maintenance work that he had been performing. Patterson said that he had not evaluated Ludwig Jr. prior to his assignment to the maintenance tech job and that the June 25, 2002 evaluation and the attached new job description were his

charge as with the other maintenance techs, he did not think the duties and responsibilities of the new job descriptions entailed any such impositions. That is how I interpreted the thrust of his denials to these charges.

<sup>79</sup> Patterson felt that Wagner did not avail himself of the Fanuc robotics training opportunity.

<sup>80</sup> Patterson was not sure of the actual date of Cook's becoming a maintenance tech but thought it occurred shortly after the review by Torrey. Notably, Torrey did not make notes on Cook's job description or provide time lines for his acquisition of the required skills. Torrey testified that he observed the work of Cook (and other maintenance techs) and believed that he (and they) worked to the best of his ability. He noted that the quality of the maintenance techs' work was not problematic, but the amount of work they accomplished was. Torrey also noted that repetitive problems were an issue in the maintenance department.

first review of Ludwig Jr. in the new job, which Ludwig Jr. started in about August 2001.

Patterson did not think that the job description imposed any new and onerous conditions on Ludwig Jr.'s employment because these conditions were assumed by Ludwig Jr. when he became a second shift maintenance tech. Patterson, in likewise, also denied that the job description was imposed on Ludwig Jr. because of any union activity on his part; and that he had, in point of fact, never taken any action against Ludwig Jr. because of union activity. Patterson stated that Ludwig Jr. did not, however, receive a wage increase in June 2002 because of his performance-related issues.<sup>81</sup>

Patterson acknowledged that he gave Ludwig Jr. certain timelines to acquire the necessary skills, but he said these were imposed to give him a goal to reach. Patterson stated that given Ludwig Jr.'s skills level and needed improvements, the time assigned to acquire the skills was realistic, especially in the areas relating to the new equipment, for which Ludwig Jr. was given 2 years to acquire the necessary skills.<sup>82</sup>

Patterson conceded that with respect to dealing with the new equipment, a worker would require not only training but experience to gain the necessary skills. Patterson refuted Ludwig Jr.'s testimony that he had received no training in maintenance from the time he started in the maintenance position to the time of Patterson's initial review of him on June 25, 2002. According to Patterson, there were daily opportunities for hands-on training in the department; Patterson said that he was more than willing to help the maintenance techs, and in fact, cited as an example his having worked with Ludwig Jr. on furnace calibrations in order to assist him in meeting the 90-day goal covering this aspect of his job. Patterson also noted that Ludwig Jr.'s father, a knowledgeable electric worker, worked on his shift and was available to train his son on the PLCs, reading the electrical schematics, and basic trouble shooting on the machines. Inasmuch as electrical problems were present daily, Patterson assumed that Ludwig Jr. would (or could) work sideby-side with his father to gain training on this aspect of the machines' operations.

Brian Lehmkuhl testified that he is currently serving as the Company's maintenance supervisor; he has held the position since June 17, 2002, his hire date. Lehmkuhl's stated that his duties include supervising and evaluating the performance of the maintenance techs.<sup>83</sup>

<sup>&</sup>lt;sup>81</sup> Patterson gave Ludwig Jr. the next lowest evaluation. It should be noted that in his general comments in Ludwig Jr.'s evaluation (GC Exh. 12, p. 2), Patterson notes that Ludwig Jr.'s prior job in maintenance focused on preventive maintenance and he needed considerably more "involvement" to become an effective maintenance tech.

<sup>&</sup>lt;sup>82</sup> Patterson notes on Ludwig Jr.'s job description indicated that of the 22 elements, he could not do 7 and needed improvement in about 6. As a general matter, I would note that the skills and duties Ludwig Jr. could not do related to the new automated equipment.

<sup>&</sup>lt;sup>83</sup> Lehmkuhl said that he was not employed at the Company during the union election. Lehmkuhl stated that he possesses degrees in electrical engineering and automated manufacturing technology. Notably, Lehmkuhl took the view that his education and his other employment working with robots and (automated) machinery aided him in being able to work at Intermet. Lehmkuhl previously worked the first shift, 7 a.m. to 5 p.m., but has worked sparingly on the third shift where the job

Accordingly, Lehmkuhl acknowledged that he evaluated Shembarger's performance on November 21, 2002 (and January 29, 2003), and prepared his evaluations along with the notations on the accompanying job descriptions, he also noted that he considered Shembarger's previous (June 2002) review and factored this review in his subsequent reviews of Shembarger's performance. Rehmkuhl denied that there was any connection of Shembarger's poor ratings with his union involvement or prior testimony in Intermet I. Essentially, Lehmkuhl stated that he down-rated Shembarger because he did not improve upon the things he was asked to do in June, as well as in later reviews.

Thus, according to Lehmkuhl, Shembarger simply did not improve upon his trouble shooting skills over the period covered by the two evaluations he issued to him. Lehmkuhl cited two examples of Shembarger's poor trouble shooting skills, one involving his misdiagnosis of a malfunction in the saw motor of a particular casting machine resulting in downtime, and his failure on another occasion to properly trace a blockage in an air line serving another cell which resulted in the machines being out of service for an entire shift.

On another occasion, Lehmkuhl said that Shembarger repeatedly attempted repairs on the air valves associated with a casting cell when, in fact, it was discovered on the next shift that the problem was a bad cable. According to Lehmkuhl, Shembarger was working on the wrong part of the machine. Then, too, Lehmkuhl cited the example of a cell robot's repeatedly blowing of fuses, a problem Shembarger could not correct. However, technicians on the next shift determined the problem to be caused by bad electrical wiring. According to Lehmkuhl, Shembarger kept replacing the fuses without determining the cause for the overloads.

Lehmkuhl explored other areas where, over time, Shembarger did not adequately improve. Regarding Shembarger's PLC skills, Lehmkuhl said that Shembarger never took advantage of the (on-the-job) or formal training which the Company had provided him in the past. Be noted that Shembarger, in spite of the required goals of completing the hydraulic training CDs and the robotics' CDs, never viewed them.

Lehmkuhl also noted that Shembarger was assigned to arrange and develop a system for the welding and grinder equipment, to keep them clean and accessible to the workers, but did

required him to stay beyond his normal tour of duty. Lehmkuhl also noted that he acquired the skills associated with repairing and trouble shooting the machinery at the Company by learning from Patterson, his supervisor, the machine operators, and getting involved hands-on with problems that cropped up with the operation.

<sup>84</sup> Lehmkuhl acknowledged that he consulted with Patterson and General Manager Joseph Barry regarding the maintenance tech evaluations, basically going over his notes with these supervisors. Lehmkuhl said that while they suggested that he include specific examples of poor performance/ability on the form, they did not suggest conclusions regarding the maintenance techs' performance. In that regard, Lehmkuhl insisted that his evaluations were based on his own experience with the individual techs. Lehmkuhl admitted that Barry made additions to the job descriptions; Patterson added the time lines as a general matter.

85 Here, Lehmkuhl said that he relied on Patterson's June 2002 review, which indicated on p. 1 (of GC Exh. 16) that Shembarger had received PLC training in the past.

not do this. Lehmkuhl acknowledged that Shembarger read a book as required but, in his view, Shembarger basically plagiarized a part of the book whereas he was supposed to write an original report in his own words.

Lehmkuhl said that Shembarger's trouble shooting skills simply did not improve, noting that around the January 2003 review time, Shembarger could not repair a malfunctioning machine that he believed had a problem with a safety-related switch; a technician on a later shift determined that the problem lay with a machine shaft that had unscrewed itself from a piston assembly. Shembarger had tried to fix the problem with repeated but erroneous adjustments of the switch mechanism. Additionally, in his view, Shembarger had made no improvement with learning the programmable logic controllers (PLCs) or on other electronics or hydraulics systems.

Lehmkuhl stated (on balance) that as of January 2003, Shembarger was not good (improved) at repairing the machinery and that at the last interview with him, Shembarger admitted that he did not even try to do better, a statement the temerity of which Lehmkuhl said stunned him even though he suspected as much.

Lehmkuhl disputed Shembarger's claim that he was not afforded the necessary training to acquire the skills in question. Specifically, with respect to Shembarger's claim that he received no MP 2 system training between May 2002 and his November 2002 review, Lehmkuhl said that Shembarger never got involved or asked questions about learning the system that receives and tracks all of the Company's repair and work orders. Lehmkuhl said that Shembarger was also incorrect in claiming he had or was given no time to practice moving the robots to the home position to effect repairs because any repairs to the casting cells, which occurred fairly routinely daily, entailed moving the robots that served the cells. However, according to Lehmkuhl, Shembarger (and the other maintenance techs) would never try to do this; instead, he (and they) would ask an operator to move the robots.

Lehmkuhl said that Shembarger also had attended the early robotics' training course and the Company had set up a robot unit in the shop for the techs to practice on when they were being initially installed. Essentially, Lehmkuhl felt that Shembarger was given sufficient opportunity to learn on and practice with the robots but did not avail himself of these opportunities. On balance, Lehmkuhl thought Shembarger's reviews were fair and in no way connected to his union involvement or hearing testimony. <sup>86</sup>

Turning to his evaluation of Crosby in October and December 2002, Lehmkuhl again noted that he referred to Patterson's May 2002 evaluation to assist him in terms of measuring Crosby's progress regarding the goals he had been assigned to reach and areas of needed improvements. Lehmkuhl said he reviewed both evaluations with Crosby and the resulting low evaluations were based on Crosby's not having improved. Noting that while Crosby was at the top of his pay grade and

<sup>&</sup>lt;sup>86</sup> Lehmkuhl also noted that, contrary to Shembarger, he gave Shembarger credit in reference to the November 2002 review's requirement that he review the SPIs and document this in writing. Lehmkuhl said that Shembarger did do this.

could not have received an increase, Crosby, nonetheless, did not deserve a raise in Lehmkuhl's view. Lehmkuhl again stated that the evaluations had nothing to do with Crosby's union activity or prior testimony; his failure to achieve the goals assigned to him led to the poor evaluation he was given.

Lehmkuhl recited a litany of deficiencies in Crosby's performance for the period covering October 2002, which he listed in the goals and objectives section of the performance evaluation (see GC Exh. 21, p. 2). Lehmkuhl also stated that for the December review, again Crosby had failed to complete the goals and objectives set out in the review documents (see GC Exh. 22, p. 2).<sup>87</sup>

Regarding Crosby's claim that he had not received training in the areas where he was deemed deficient, Lehmkuhl generally disputed this. Lehmkuhl directed himself to the items among the 22 elements for which, in his view, Crosby received training to accomplish the stated goals.<sup>88</sup>

Regarding item 3 (the trouble shooting element), Lehmkuhl said that Crosby received on-the-job training from Patterson and Lehmkuhl himself. In Lehmkuhl's view, Crosby should have learned much from Patterson in particular during the installation phase of the new machinery.

Contrary to Crosby, Lehmkuhl said that Crosby had installed machines and electrical components before (item 4) and had therefore received training in this area. Regarding the reading of electrical and hydraulic schematics (item 7), Lehmkuhl said that Crosby worked with the Company's electrician (Don Winnell) for more than 20 years—"training" in his view. As to setting up and programming automatic equipment (item 10), Lehmkuhl said that Crosby had received the robotics training: so, in Lehmkuhl's view, Crosby was mistaken regarding having received no training in this area. Lehmkuhl said that Crosby observed him and Patterson connecting the lap top to the machinery many times, so that he had ample opportunity to learn how to establish machine to automation equipment interfaces (item 11). Similarly, Crosby filled out work orders as part of his job and so he had to know the MP 2 system or should have understood and followed the operation preventive maintenance system, which relates to item 12. Lehmkuhl also noted that since all of the new machinery operated hydraulically, he could not agree with Crosby's testimony that he received no training in hydraulics operations.

Contrary to Crosby's testimony that he was given no training regarding the PLC machine logic element (item 16), Lehmkuhl said that Crosby could have learned this skill from Dave Patterson. However, whenever a PLC problem arose, Crosby would call for Patterson's help, and then, as opposed to getting in-

volved with the problem and learning something, he would go off to some other task, leaving the repair to Patterson. Also Lehmkuhl said that the Company purchased PLC videos to aid the techs in achieving this goal; however, Crosby never sought training help with this as far as he was concerned.

Regarding Crosby's complaint that in spite of his having fabricated a bracket, he had received a negative review, Lehmkuhl conceded that Crosby had good skills in fabricating and general repair, which was acknowledged in the December review. However, after speaking with Patterson, Lehmkuhl stated that he discovered that Crosby had received a lot of help with the bracket. Lehmkuhl felt that in spite of his building skills, Crosby would not use them to create a useful design. On balance, Lehmkuhl felt that Crosby deserved the low performance ratings that he received in both evaluations. 89

Regarding his reviews of Wagner's performance in December 2002 and March 2003, Lehmkuhl said that both Patterson and Barry assisted him in preparing them, and he used specifically Patterson's July 28, 2002 review of Wagner as a reference and relied upon it in the later performance reviews. Lehmkuhl stated that Wagner's lowered rating (the lowest possible) was based on his poor performance and lack of improvement in required areas.

According to Lehmkuhl, Wagner was the maintenance tech primarily working on the furnaces; repair and maintenance of the furnaces were almost his full-time occupation. According to Lehmkuhl, during the period covering the December review, Wagner's furnaces were going down at a rate of three per day on a couple of shifts. This simply was not acceptable to management which felt that the furnace, once repaired, should stay fixed until then next scheduled maintenance. According to Lehmkuhl, Wagner was not effecting more permanent repairs. This accounts for his comment in this review that Wagner needed to investigate and prevent further problems in the case of multiple crucible breakdowns. 90

Lehmkuhl noted that Wagner had not improved upon his electrical troubleshooting skills as required by the July review; similarly he had no improvement in hydraulic troubleshooting.

<sup>&</sup>lt;sup>87</sup> Lehmkuhl felt that Crosby, as well as the other alleged discriminatees, did not even try to meet their goals. He said that if they had, he would have given them credit on the second review for the effort. In spite of his perception that they were not trying to improve, Lehmkuhl said that he gave credit where he could. For instance, Lehmkuhl said that he gave Crosby credit in the December review for moving the "decham" robot to do a preventive maintenance even though Crosby made no attempt to complete the robotics training CDs. (See GC Exh. 22, p. 2.)

<sup>88</sup> Lehmkuhl focused on Crosby's last review in discussing Crosby's training and/or training opportunities.

<sup>&</sup>lt;sup>89</sup> Lehmkuhl conceded that between the summer of 2002 and through the fall and including the December (and early January 2003 evaluations period), there was no formal training provided to the maintenance techs by the Company; on-the-job or everyday work experience was the only training mechanism for these workers. (Tr. 77.) While somewhat evasive at first, Lehmkuhl also admitted that he did not schedule any time for the maintenance techs to read manuals (the SPI manuals) and other training items to assist them to accomplish their respective goals originally set forth in Patterson's evaluation and job description. He also admitted that he never issued any reprimands or disciplines to the techs he observed standing around while others did work he felt they should be learning how to do. (Tr. 1177–1178.)

<sup>&</sup>lt;sup>90</sup> Lehmkuhl said hot metal splashing on the furnace elements can cause breakdowns in the furnace operations. Lehmkuhl also testified, consistent with his performance evaluation, that on October 17, 2002, the furnaces were discovered to be leaking air which, under pressure, pushes metal into the casting molds. According to Lehmkuhl, when he came in on first shift that day, most of the furnaces were leaking. To Lehmkuhl, Wagner, as the third-shift "supervisor," was not providing sufficient leadership since the machines went down a lot on third shift and were still down when he came in on his shift.

Wagner also did not complete certain specific assignments Lehmkuhl gave him, such as starting a log book and to organize (lay out) and maintain the furnace rebuild area which had accumulated damaged crucibles and furnace parts. 91 Wagner also failed to read the two motivational books from the Company's library.

Regarding Wagner's last evaluation in March 2003, Lehmkuhl noted the areas where Wagner needed improvement, such as completing detailed work orders for crucible/furnace repairs, correcting multiple furnace failures, and inability to diagnosis and repair an X-ray machine failure. Lehmkuhl felt that Wagner simply showed no effort to attain any of the goals of his job. He noted that during the period between his last evaluation and March 2003, Wagner had not read the library books nor had he laid out the furnace rebuild area, and that (often) things that were broken on Wagner's shift did not get fixed until he and Patterson, or another employee (Nathan Lee), arrived for their first-shift tour.

On balance, Lehmkuhl felt that Wagner did not deserve a wage increase at any time during the evaluation periods in question because he had not improved. Lehmkuhl denied any connection of his evaluation to Wagner's union activities.

As with the other techs previously discussed, Lehmkuhl denied Wagner's claim that he received no training between Regarding trouble shooting skills. evaluation periods. Lehmkuhl felt that Wagner should have received on-the-job training to acquire or improve upon this skill set since all the machinery in the plant included mechanical, electrical, and hydraulic functions; and if he repaired a machine, he should have acquired skills in these areas. Lehmkuhl further stated that there was training (CDs and videos) for installing and maintaining automation equipment available to Wagner. Moreover, according to Lehmkuhl, Wagner could have asked questions and learned how to move the robots, 92 and just getting involved could have provided him with training in the required skills. Regarding reading schematics, Lehmkuhl said there were manuals readily available at the plant for Wagner to consult and thereby receive training to improve his skills in this area. Lehmkuhl said that Wagner made no effort to learn the MP 2 system.

Lehmkuhl said that he evaluated Cook in late September and on December 9, 2002, using Cook's former supervisor, Don Torrey's May 2002 evaluation as a reference point and guide; he did not rely on any other prior review of Cook. Lehmkuhl stated that he reviewed his evaluations of Cook with him on each occasion and explained to him the reasons for his low (the lowest possible) ratings.

Lehmkuhl stated that Cook basically did not complete his assigned goals and objectives and that his ratings reflected this. Lehmkuhl said that Cook needed to improve his fabrication skills, citing his making up and welding items crooked and/or out of square.

According to Lehmkuhl, Cook also took an excessive amount of time to make repairs resulting in excessive downtime for the casting machines<sup>93</sup> and was known not to make entries in the maintenance log as he was directed to do.

Lehmkuhl noted that Cook also only completed two of the objectives Torrey had set for him in the May review, a point he noted in his September review. Lehmkuhl related several matters that Cook did not attend to or complete as required, including not completing all of his preventive maintenance assignments (several were not completed); not learning the PM training matrixes and demonstrating his knowledge to his supervisor; not rebuilding the recirculating pumps; not making a visual management (sign) system; and not reading the two library books. Cook also did not always obtain a work order form for a repair as required; did not read the SPIs and demonstrate his understanding; and did not keep the septic water system area clean

Turning to his December review of Cook's performance, Lehmkuhl noted that Cook still had not made the needed improvements in the intervening period between reviews. Cook still took too long to do repairs; his fabrication skills had not progressed, he was not writing in the log book; and not filling out his preventive maintenance paperwork contemporaneous with the work completed. Lehmkuhl also noted that Cook had picked up a safety violation for leaving a safety device off of a machine he was repairing and given a written warning for this. Cook also did not keep the recirculating water area of the plant clean. As to his goals, Lehmkuhl said that Cook only met one of the goals he was assigned, and he made little effort to reach the remaining goals. <sup>94</sup>

Regarding training or training opportunities to reach his goals, Lehmkuhl felt that Cook had the opportunity to get training on the job, especially with the robots since he worked on their grippers and changed sensors repeatedly. He disputed Cook's assertion that he (Cook) had not received or did not have opportunity to receive training regarding job description elements 4, 5, 10, and 11 either because he was, as part of his job, working on the machines daily or the educational materials covering these duties were available in the library.

Regarding element 21 (the SPIs), Lehmkuhl says that it would only take a maintenance tech about 2 hours to read them and this could be done on company time. However, Cook missed two dates—one in July 2002 and another in November 2000—to complete this requirement, as noted in his comments in Lehmkuhl's December review.<sup>95</sup>

<sup>&</sup>lt;sup>91</sup> Lehmkuhl noted that furnace parts were left all over the place and old furnaces were blocking exit doors.

<sup>&</sup>lt;sup>92</sup> Lehmkuhl noted that Wagner, contrary to his testimony, was given opportunities to demonstrate that he could work on the robots and he, in fact, worked on the robot grippers on his shift.

<sup>93</sup> According to Lehmkuhl, Cook derisively was called "four hour Mark" around the plant because he was so slow in getting his repairs done

<sup>&</sup>lt;sup>94</sup> Cook's December evaluation indicates that he managed to complete the requirement that he complete 100 percent of all assigned preventive maintenance assignments for any given month. The remaining eight were deemed "incomplete" by Lehmkuhl.

<sup>&</sup>lt;sup>95</sup> Lehmkuhl acknowledged that Cook did not get training with respect to element 16 (trouble shooting, writing and rewriting, and designing PLC machine logic; that this was a long range goal for which he was given 2 years to acquire. Nonetheless, Lehmkuhl said the library contained PLC materials for Cook to review but he did not do this. Lehmkuhl said Cook could not install equipment per element 4.

Lehmkuhl stated that he evaluated Ludwig Jr. in December 2002 and February 2003; Patterson's May 2002 evaluation of Ludwig Jr. was referred to in these reviews, and the objectives' time lines in particular were relied on to appraise Ludwig Jr.'s job performance. Lehmkuhl admitted that Patterson and Barry assisted him in preparation of these reviews but that the results were based solely on his experience with Ludwig Jr.

Lehmkuhl said that Ludwig Jr. received the lowest possible rating in December because of no demonstrated improvement of his skills, most notably trouble shooting the machine systems and his robot handling skills.<sup>96</sup> Moreover, it was his view that Ludwig Jr. did not take any initiative in these areas. Additionally, Lehmkuhl said that he assigned him to clean the waste water (recirculating) area. Lehmkuhl said he had to remind Ludwig Jr. that this was his job. 97 Ludwig Jr. did not review all of the SPIs as assigned. Lehmkuhl noted that in spite of his personally training Ludwig Jr. on furnace control calibrations on two occasions, Ludwig Jr. never did this on his own nor did he train anyone else. According to Lehmkuhl, Ludwig Jr. also did not complete the requested review of the training CDs and never made detailed entries in the maintenance log book as required. Although Ludwig Jr. was asked to use the MP 2 tracking system, he never, as Lehmkuhl put it, "got involved" with learning the system.

Moreover, according to Lehmkuhl, Ludwig Jr. did not complete several work orders timely and when he completed work did not turn in a completed form, frustrating the MP 2 system. In Lehmkuhl's view, Ludwig Jr.'s performance worsened. Lehmkuhl felt that Ludwig Jr. did not deserve a wage increase, but not because of his union activities; he thought that the December 2002 review was a fair assessment of Ludwig Jr.'s performance, uninfluenced by any union concerns or involvement.

On balance, Lehmkuhl noted that the low evaluations he gave Ludwig Jr. in December and February were based not only on his not improving his skills such as troubleshooting, citing some examples, but also because Ludwig Jr. picked up a safety violation (involving the same safety equipment as Cook). In the period between December 2002 and February 2003, according to Lehmkuhl, Ludwig Jr. still had problems with timely turning in even his completed PM assignments. Basically, Lehmkuhl felt that Ludwig Jr. did not complete the goals he had been assigned as far back as the May 2002 review and these differences were noted in both of the evaluations he issued to him

Lehmkuhl disputed Ludwig Jr.'s claim that he was unaware that he was to provide written proof of having read the SPIs and related policies pointing to the requirement, noting that Ludwig Jr.'s May 2002 review required him to read and know the SPIs. Additionally, Lehmkuhl knew that Patterson had given him

Lehmkuhl noted rather acerbidly that relative to element 5, which called for him to train others in routine diagnosis and preventive maintenance of the electrical hydraulics and electronic systems, Cook had no skills to train anyone in these areas.

Ludwig Jr. a document with the SPIs listed and had asked him to sign and turn it back in once he had completed this task.

Lehmkuhl also disputed Ludwig Jr.'s claim that he had received no training with respect to elements 3, 7, and 17, saying that with respect to 3 (trouble shooting), he had to learn something about the machines that he worked on and, furthermore, Ludwig Jr. spent time with Patterson and himself (doing repairs) and certainly should have learned something. Agreeing that the Company did not provide Ludwig Jr. with formal schematics reading training (#7), Lehmkuhl stated that Ludwig Jr. could have taken advantage of Patterson's experience and gotten involved and asked questions in order to learn this skill, just as he (Lehmkuhl) had learned this skill on the job.

Lehmkuhl noted that contrary to Ludwig Jr.'s claim that he could perform certain job requirements 100 percent, he actually could not perform element 9 100 percent because he never learned the MP 2 system; also he had very limited welding skills (element 17); he could not meet the required design skills (of element 18); he could not implement facilities maintenance (element 19) 100 percent; and he did not submit SPIs documentation (element 21) as required.

Lehmkuhl said that regarding the December 2002 evaluation, because Ludwig Jr. received a safety writeup, he could not receive a wage increase. However, Lehmkuhl said that he would not have given Ludwig Jr. an increase in any case. Lehmkuhl noted that Ludwig Jr.'s February 2003 performance also was equally poor. Neither evaluation, according to Lehmkuhl, was influenced by Ludwig Jr.'s union activities.

Joe Barry testified about the genesis of the maintenance techs' job description which was applied to the five alleged discriminatees. As noted earlier, Barry stated that the maintenance tech position was introduced in 1998 and, in his view, remained largely unchanged until 2003. Party recalled speaking to Crosby, who was then working closely with Patterson to get the machines up and running, and telling him about the opportunity the new business presented and the need for all employees to step up (their skills) and to work closely with Patterson who was the most knowledgeable about the new process. Barry said that Crosby agreed with him and indicated that he liked working with Patterson.

Barry did not take issue with Patterson or Lehmkuhl regarding the evaluations of the five maintenance techs. Barry stated that he was aware of the Union's charges that the job description and the reviews were unfairly issued to the maintenance techs because of the Union, but denied any connection of the Company's actions and the individuals' involvement with the Union or prior testimony. Barry indicated that as was his practice since around 1996, when the performance review system went into effect, he has personally examined all employee reviews, mainly because he felt the supervisors were not properly trained in evaluating workers. Accordingly, he reviewed the

<sup>&</sup>lt;sup>96</sup> Lehmkuhl remarked at the hearing that Ludwig Jr. still could not move robots and required assistance from other workers, just as he could not at the time of his evaluations.

<sup>&</sup>lt;sup>97</sup> Ludwig Jr., however, was given credit by Lehmkuhl for keeping the waste water treated and the equipment in working order.

<sup>&</sup>lt;sup>98</sup> Barry offered that the job descriptions were changed basically to accommodate what he described as a certification program (the Q59000) that the Company was required to obtain. Barry did not elaborate on this program.

performance evaluations of Patterson and especially Lehmkuhl, who was new to the plant.<sup>99</sup>

Barry denied that Lehmkuhl was hired to monitor employees' union activities and also denied having a conversation with him in which Lehmkuhl said he thought that someone (the Union) was telling the maintenance techs not to work.

Regarding the requirement that employees read two library books as part of their performance evaluation, Barry said that contrary to the charges, this was not a new requirement for the maintenance techs' 2002 jobs. According to Barry, he actively imposed this requirement in January 2001, about the time discussions about changing the business became serious, and improvements of the skills of the work force became part of that discussion. Barry said that his idea and goal was to prepare the entire work force for the changes and the books he selected for their reading dealt with changes and the teamwork necessary to facilitate change. Barry admitted that he expected the employees to read the books on their own time and never told them they were to be compensated for reading. In fact, he never had the intention of paying them to read these books. 100

Barry stated that the Company decided to lay off permanent employees during 2003, something that had not been done during the entire time he was employed by the Company. Barry noted that while some layoffs occurred prior to May 2003, the first maintenance tech layoffs took place on about May 9, 2003. The layoffs were to be accomplished by job classification, shift, and seniority. According to Barry, Patterson, human resources head Maze, and he made the layoff decisions. <sup>101</sup> The maintenance tech position was the job clarification to be included in the layoffs in the maintenance department, which was to be reduced to two maintenance techs from the seven available and occupied maintenance tech positions.

Barry said because the layoffs were a first for the Company (not counting plantwide shutdowns), there were no previously established rules governing such a situation. However, because sales were not forthcoming, the layoffs were deemed necessary by the Company. Barry explained the economic situation in which the Company found itself in 2003, which led to the layoffs of the maintenance techs and others in May and June 2003. 102

Barry said that he had prepared the Company's 2002 budget in October 2002 using various information sources such as internal corporate projections of total number of vehicles the auto industry expected to build and the vehicle platform (e.g., passenger or sport utility) anticipated to be a part of the total. Barry included in his budget calculations an anticipated increase in plant operational efficiency inasmuch as the new process and machinery had been in place for over a year and a half. Barry also took into account that during the 2003 production run, Intermet would be adding a second company, Metaldyne, a subcontractor for Chrysler's Durango line of sport utility vehicles. Barry's budget was sent to corporate headquarters where it was ultimately approved.

Barry identified at the hearing his 2003 budget which anticipated gross sales for 2003 of about \$26,473,000 (R. Exh. 114), representing an anticipated increase of about \$4,688,000 over the Company's 2002 actual gross sales (R. Exh. 111). <sup>104</sup> In short, Barry said that his 2003 budget was predicated on about a 20- to 21-percent forecasted increase in business for the 2003 fiscal year which would, in turn, meet corporate concerns for a respectable return on the \$10 million invested in the new business.

Barry further explained that his Intermet facility received a much greater capital investment than other corporate plants because of the parent Company's faith in the new casting process. Accordingly, corporate expectations for a good return on its investment were very high. Barry said that he tried to be very sure of his number projections and conducted his own research to come up with the 2003 sales projections of which the new HB (Chrysler) steering knuckle business was to be a major part.

Barry said that the Company, based on the prior contracts, was producing and selling the Delphi (GM) parts from January through March 2003 although the sales were a little below expectations. Barry said he planned to start, in a limited way, the new HB knuckles in April 2003, hoping to have total sales of about \$2,413,000 that month. In fact, however, the April 2003 sales were only \$1,794,000. This pattern of lower than expected sales persisted through May, June, and July, when the expected ramp up would normally have begun. <sup>105</sup>

Barry said that in spite of the early lower sales, he opted not to lay any employees off in January, February, or March. Rather, he decided to take a risk and build inventory for the Chrysler knuckle during these months, mainly to keep his em-

<sup>&</sup>lt;sup>99</sup> Barry stated that Patterson hired Lehmkuhl because two key employees had left the Company and, in combination with the new process and lower than expected production and efficiency, Patterson needed help

help.

100 The book review requirement was eliminated by the Company around September 30, 2003, based on a recommendation from an employment specialist hired by the Respondent to address employee complaints and concerns. (See GC Exh. 48.)

Barry noted that he went to other department heads, advising them to reduce employees in a way that would affect manufacturing least. Barry could not recall whether the seniority criterion was to be applied by plant or department. However, he was sure that the job classification/shift/seniority approach applied to all departments.

<sup>&</sup>lt;sup>102</sup> I note that all of the affected maintenance techs were offered alternative positions with the Company in lieu of a complete termination. The charges relate to the layoffs of the named individuals from their maintenance tech positions, so, irrespective of the alternative job offers and eventual placements in the Company of the named techs, the layoffs are the crucial point of reference for resolving the issues here.

<sup>&</sup>lt;sup>103</sup> This was very important to Barry in part because Intermet's contract with Delphi to produce existing steering knuckles required a "give back"—a rebate of sorts—based on expected efficiency and lower costs in the production of the GM steering knuckles.

<sup>&</sup>lt;sup>104</sup> The Respondent's manager of finance, Charles Rytlewski, testified that the Company's budget, once approved by the board or directors, is presented in the Company's financial statements to shareholders, Wall Street investors, and the Securities and Exchange Commission.

<sup>&</sup>lt;sup>105</sup> Barry explained that in the automobile industry, the new model year vehicles are usually in the showroom by September. However, the launching of the vehicle is preceded by what he called a "ramp up" of production of parts and assemblies as early as April with full volume production anticipated for August and September.

ployees employed and to give the Stevensville plant an appearance of strength. <sup>106</sup> Barry stated that his hope was that he could start selling this inventory in the second and third quarters of 2003—April through September.

However, Barry's plans and hopes for the increased sales did not materialize. A number of factors conspired to frustrate his plans.

According to Barry (and Rytlewski), the Chrysler inventory—the HB knuckle—was cast but not put through the X-ray and other processes to verify its quality for final shipment.

Ultimately, this inventory was deemed no good and about 75 to 85 percent of these parts had to be scrapped. Accordingly, this inventory had to be reproduced, resulting in a very negative financial picture to the Company throughout 2003.

Second, the sales for the Delphi (WK) knuckles (under the previous contract) did not rise as expected through the first half of 2003

Third, beginning around March 2003, Barry said that there were rumors in the industry that Chrysler might not be employing on the Durango the aluminum steering knuckle that Intermet was planning to produce, choosing instead a cast iron piece. According to Barry, the rumors got stronger and stronger and it was then that he became very nervous, thinking that worst case, the Company could be out of business. Barry said that although things were going badly and he was facing mounting pressure from corporate, his plan was not to hurt the performance of the plant. Barry said that he discussed with Jesus Bonilla, corporate vice president with oversight of the Stevensville plant, the significant variance between budgeted as opposed to actual sales sometime near the end of the first quarter (March–April 2003) and the need to devise a plan to rectify the problem. <sup>108</sup>

<sup>106</sup> According to finance manager Rytlewski, if a manager builds inventory when he has no orders, he risks not being able to recover the expenses, such as the internal interest the plant is charged by the corporate parent for producing and storing unsold inventory. Also, there is the risk that the inventory produced in advance of sales will not be acceptable product for the customer, whose specifications may have changed by the time the actual orders come in. Rytlewski stated that the general corporate world's response to a reduced sales picture is to cut employees (use temporary workers and recall workers) as opposed to the riskier approach undertaken by Barry. (Tr. 1928–1929.)

Barry related that the 2004 Dodge Durango was planned to be produced at a lighter weight than that which was developing in the final stages. Accordingly, the weight savings occasioned by the use of Intermet aluminum knuckle (which cost more to make than an iron unit which the Stevensville plant did not produce) no longer mattered from a business perspective. Basically, if the vehicle was going to be heavy in any event, there was no advantage in using the lighter, but more expensive aluminum part.
108 See R. Exh. 82, a letter dated May 16, 2003, from the Respondent

<sup>108</sup> See R. Exh. 82, a letter dated May 16, 2003, from the Respondent to Metaldyne outlining, among other things, the cancellations costs Intermet would be owed if the HB contract were cancelled. The Respondent's vice president, Jesus Bonilla, testified that this letter was a culmination of discussions that occurred around 30–35 days prior to May 16. Bonilla said this was a major blow to the Company. (Tr. 1244–1245.) Also, Rytlewski testified that during the first 3 weeks of the May 2003 during his first weeks with the Company, corporate officers visited the plant on two occasions expressing their concerns

Consistent with his concerns about not hurting the plant's performance, mainly its production capability, Barry said that he approached his department heads and discussed all areas where costs could be saved. Of necessity, according to Barry, this ultimately entailed personnel/labor cuts but not, if possibly avoidable, among the regular hourly employees. Personnel cuts, in Barry's view, were to be made mainly among the temporary employees and those temporary workers in the final pack line in particular.

Barry stated that his department heads at the time—Raymond Reed, Valerie Ortiz, Charles Rytlewski, and Patterson—were all asked to come up with a plan to reduce his or her labor costs. Each department head did provide a labor cost saving measure. <sup>109</sup> Barry outlined his and Patterson's approach to the problem in the maintenance department.

According to Barry, Patterson suggested that the maintenance department could stop doing preventive maintenance (PM) work since the Company was running fewer (production) machines and perhaps would be running fewer still due to poor sales prospects. Barry said that he told Patterson (as with the other heads) that he should be sure of the approach, since he (Barry) did not want Patterson to come back later complaining that this was not the right thing to do.

According to Barry, Patterson suggested that the Company could even pull some machines out of service, thereby reducing PMs. According to Barry, Patterson also said that he was developing information that would help eliminate repetitive problems, as well as the frequency of PMs. Accordingly, he did not need the current levels of manpower in maintenance.<sup>110</sup>

Patterson then suggested the layoff procedure, that is by job classification (maintenance tech), shift, and then plantwide seniority. Barry denied that the layoffs of the affected maintenance techs were connected to their union activities or prior testimony on behalf of the Union.

Barry addressed the issue of the personnel changes that took place before and after the layoffs of the maintenance techs.

According to Barry, he and Patterson decided in April 2003 that the repetitive problems with the electronic equipment asso-

about the shaky financial footing of the company and instructing very clearly that the plant had to cut costs wherever possible.

109 For instance, Barry said that Reed, whose department included the salaried staff, reduced his staff by two in the quality lab and one manufacturing engineer. According to Barry, he and Valerie Ortiz embarked upon a reduction of temporary workers in the final pack line. Rytlewski testified that he reduced his staff by transferring his accounting clerk to the receptionist position and letting go of the temporary worker serving as a receptionist. Basically, Rytlewski said that he had no assistance in the accounting department for all of 2003.

110 The Respondent introduced a document purporting to show the number of hours (work orders) various employees including Shembarger, Wagner, Cook, Ludwig Jr., and Crosby worked on repair, safety, PM, and predictive matters during the period March through July 2003. This document, R. Exh. 129, in summary seems to corroborate Patterson's position in that the repairs, hours, etc., went from a high of 828.85 to a low of 391.42 in July, after the layoffs of the maintenance techs. Notably, the Respondent argues that this was not surprising because the affected maintenance techs could not competently perform the essentials of their jobs, especially with regard to the automated equipment.

ciated with the machinery needed a solution. 111 Accordingly, they decided to add workers in the position of electrical controls' technician. Barry noted that the position required a person with the skills and knowledge of the highly sophisticated automated equipment at the plant. However, this position would not be fungible with the maintenance tech job. The electrical controls' tech was not intended to possess the skills of the maintenance tech in the altogether, although there was some overlap of skills and duties. 112 Barry indicated that in his mind the control techs would focus on the electronic issues; the maintenance techs would handle some electrical issues such as ladder logic but their focus would be on the mechanical and pneumatic functions of the machinery. Barry denied that the electrical controls' techs were intended to replace the maintenance techs who, he noted, were free to apply for the new position.

Barry said that the Company internally posted the controls' tech job in April 2003, but no one signed up for the job. Most notably, none of the current maintenance techs (see R. Exh. 99) applied for consideration. Eventually, the job was filled by Ray Turner who had been with the Company in another capacity; Brian Stone and Ryan Lee on June 2, 2003; and Martin Smith on October 13, 2003. (See R. Exh. 127.)<sup>113</sup>

Barry also noted that the Company hired two individuals, Nathan Lee and Marcus Bud, to fill the two electrical maintenance engineer positions on August 19 and September 23, 2002, respectively. According to Barry, their job responsibilities included engineering the electrical portions of the casting process; they were not hired to replace the maintenance techs but to increase the percentage of automation in the casting process consistent with the Company's emphasis on automation and reduction of labor costs.

Barry acknowledged that a former maintenance tech, Valer Pascanu, who had been with the company about 1 year (since February 4, 2002), was promoted with his approval to a manufacturing engineering technician position on April 14, 2003, about a month before the layoffs of the alleged discrimina-

tees. 114 However, Barry said that his promotion was decided before he (Barry) knew there would be a reduction among the maintenance techs in May. Barry said that Pascanu demonstrated competence in making permanent repairs; he analyzed core problems and then devised repairs that lasted. Accordingly, to Barry, Pascanu's promotion was consistent with the Company's plan to be more focused on performance assurance and reducing repetitive repairs which comprised a large bulk of the costs of operations.

Barry acknowledged that the maintenance and other workers being asked to move to other jobs, like those in final pack, faced a substantial pay cut. However, Barry said that he did not want to pay the maintenance techs the \$8 to \$9 per hour that temporary workers on average generally received. So he arrived at a figure of \$13 per hour for maintenance techs such as Shembarger and Crosby who would indeed be taking a substantial cut. Barry said that he arrived at that amount, thinking it would be sufficient to retain them but would not alienate the existing final pack workers who were making about \$12 per hour.

Barry also denied that he offered the maintenance techs transfers to the final pack line intentionally in the hope that they would be dissuaded from accepting the transfers because of the working conditions there.

The Respondent's human resources manager, Mitch Maze, confirmed Barry's testimony that there was no intention to lay off regular hourly employees. Rather, the core of the plan was to reduce the temporary employees and then redistribute the regular hourly workers throughout the plant. The key to the cost-cutting measures, according to Maze, was to structure the layoffs so that the production process would not be negatively affected and to eliminate positions that added costs.

Maze also noted that the Company shut down its entire plant operations due to low sales for 2 weeks in July 2003, in effect laying off all hourly workers, and saved money in this way. 116

Maze also said all regular employees were told that the layoffs would only be for a couple of months but that the layoffs were based on (poor) sales and production needs, so there was no way to predict accurately how long the layoffs would be.

<sup>&</sup>lt;sup>111</sup> Barry noted that as in January 2003, he and Patterson decided to increase the formal training opportunities for the maintenance techs. He authorized the formal training opportunities for the maintenance techs. He authorized Patterson to hire Fred Miller to develop classes specific to the Company's needs. Accordingly, Miller developed a test to establish a base line of the maintenance tech's skills so that appropriate classes and training modules could be fashioned for them. This test was developed and administered to the techs in April 2003. However, Barry said that in January 2003, when this plan was introduced, he had no idea that the techs would be laid off. Barry emphatically denied that this test was designed to be used to terminate the maintenance techs, all of whom, one must note, performed poorly on the April test.

<sup>&</sup>lt;sup>112</sup> See R. Exh. 126, the job classification description for the electrical controls' technician job.

<sup>&</sup>lt;sup>113</sup> Barry said that Turner had attended robotics school and applied his skills and knowledge gained on the job. According to Barry, Turner was especially good at correcting repetitive problems and was highly regarded by Patterson and Barry who placed him in the electrical controls job in about January 2003. The others assumed the job based on the April posting. However, Barry said that Stone worked only about 1 month; Lee was terminated in December 2003. Smith was promoted to another position in April 2004.

<sup>&</sup>lt;sup>114</sup> See R. Exh. 97, a payroll change form for Pascanu authorized by Patterson and Barry. Pascanu received a raise from \$14.94 to \$15.50 per hour. Patterson testified that Pascanu, in a previous performance review, had sought additional money for the exemplary work he was performing for the Company. Patterson said that he talked to Barry about Pascanu's performance which included designing and building equipment that improved operations, especially in the hardness test line, which in turn had reduced breakdowns. Patterson said that Pascanu also studied the downtime incidents in order to improve the components of the process to reduce the problem. Patterson said Pascanu's review at the end of 2002 prompted him to promote him in April 2003. Barry confirmed meeting with Patterson and Pascanu in December 2002 or January 2003 to discuss Pascanu's work and contributions.

<sup>&</sup>lt;sup>115</sup> Maze identified R. Exh. 67, a company document purporting to show that from May 3 through July 31, 2003, the Company's temporary work force went from 213 in May, 74 in June, and 49 in July.

down for about a week in July before the new models are introduced for the new year in September. The Respondent shut down similarly in 2001 and 2002, but only for 1 week.

Accordingly, Maze said that like the maintenance techs, other regular employees were asked to move from their incumbent jobs to another position which entailed a cut in wages for some. 117

Maze testified that the Company has not hired any maintenance techs since the May 2003 layoff; the only hires after the layoffs of the maintenance techs in addition to electrical controls' techs were hired for nonmaintenance positions.<sup>118</sup>

B. The Suspensions of Employees Tom Turney and Lenora Richmond on February 28, 2003; Their Discharges on March 4 and 5, 2003

In paragraphs 9(e) and (f) of the complaint, the Respondent is charged with suspending Turney and Richmond and ultimately discharging them both, in essence, because of their union activities and to discourage membership in the Union by its employees in violation of Section 8(a)(3) of the Act.

Turney and Richmond testified at the hearing relating the circumstances leading to their suspensions and discharges.

Turney had been employed by the Respondent since March 17, 1998; his most recent position was laboratory technician, which he had occupied for about 1 year. Turney said that he had worked the second shift (3:30 to 11 p.m.) since 1998.

Turney testified that he was aware of the union organizing campaign and participated therein directly by soliciting authorization signatures on behalf of the Union and attending union meetings; Turney also signed the authorizing petition. 119

Turney explained his duties and responsibilities as a lab tech at some length. Essentially, according to Turney, the lab tech is responsible for ensuring that each crucible of molten metal meets the standards for metal integrity for the casted parts. Generally, according to Turney, each crucible of metal is subject to three tests—the K-mold test, the RPT (gas density test), and the spectrometer (chemical analysis) test. 120 Turney ex-

Maze cited the example of tool and die employee Earl Swank, who was asked to go to a finishing (final pack) job with a reduction of about \$4.63 per hour. Maze agreed that Crosby and Shembarger would take cuts in their wages by going to the final pack area but the cuts were in line with Swank's and the rates they received were well above the \$8-per-hour wage rates there.

118 See GC Exh. 90, which reflects the Respondent's hourly work force during the relevant period. The employees hired after May 2003, excluding the electronic controls' techs, were Andrew Jerz, hired on May 12, 2003, as summer student cooperative lab technician and who quit on August 15, 2003, to return to school; Jameel McGee, a casting cell tech hired May 27, 2003; Tommy Atkins hired May 12, 2003, as a finishing tech; and Steven Skinner, hired October 20, 2003, as a finishing tech. These employees were paid as low as \$8.50 per hour (McGee) and no more than \$13 per hour, the finishing tech rate. Atkins received \$9.50 per hour. Finishing techs work in the final pack line, as previously noted.

<sup>119</sup> Turney was identified by his former supervisor, Don Torrey, as an employee generally known to be responsible for instigating the union organizing drive at Intermet. (Tr. 358.)

120 The K-mold test examines the metal sample for inclusions or pockets of gas in the metal. Two or more inclusions will result in a rejection of the crucible by the lab tech. The RPT or density test determines whether metal has the proper or correct amount of gas. An RPT sample called a hockey puck is weighed in water and, if good, will give a reading of at least 2.55 or above. The spectrometer test entails

plained that the testing process begins with the foundry technician bringing hardened samples of the molten metal to the quality laboratory. The foundry tech documents the sample by marking it with the crucible number and machine number, the time, the metal alloy, and filling out a crucible approval/rejection sheet<sup>121</sup> and includes the vacuum pressure of the sample.

Turney said the lab tech is responsible for performing the three tests and makes his entries on a form called the PCP crucible metal analysis logsheet. <sup>122</sup> The metal analysis log sheet requires the lab tech to record the crucible tested, the date of testing, the time, and whether the sample passed or failed the three tests; the lab tech then is required to place his initials or employee clock number signifying that he has performed all tests as indicated.

Turney, who used the initials "TT," also said that the lab tech must also initial the pertinent crucible approval/rejection form indicating the time and date that he checked off the pass/fail boxes for the three tests performed on the crucible samples. If the sample passes, the metal is released for production. The turnaround time for this entire process is about 45–80 minutes. Turney stated that if it passes, the K-mold sample is discarded into a hopper; the density puck and the spectrometer cookie are stored in buckets and saved for 24 hours. <sup>123</sup>

Turney stated that he worked his normal shift on February 27, 2003, along with his lab partner, Lenora Richmond. On February 28, he reported for work and, at around 4 p.m., the metallurgist, Hema Guthy, told him to report to the main office where he met with Joe Barry, Brandon Reed, the quality manager, and Guthy.

Reed showed him the crucible metal analysis logsheet for February 27<sup>124</sup> which contained Turney's initials and asked him if he saw anything wrong with the document. Turney said that he responded that the only thing "wrong" was that the initials for crucibles 11 and 4 were different. Turney said that he told Reed that the initials—TT—were his but that he did not physically write them on the form. Crucibles 11 and 4 were initialed as having been approved at 6 p.m. and 6:15 p.m., respectively.

Turney said that Reed then directed him to entries for crucibles 6 and 11, initialed as approved at 5:35 and 6:45 p.m., respectively. Reed then asked, considering the typical turnaround time for testing, how it was possible to run tests on crucible 6 at 5:35 p.m. (as indicated on the form), and then again at 6 p.m.;

examining a sample called a "cookie" that is cut into three pieces and subjected to heat; and a chemical analysis report is produced.

<sup>&</sup>lt;sup>121</sup> See GC Exh. 3, a crucible approval sheet for February 27, 2003; GC Exh. 4, a spectrometer test for February 27, 2003.

<sup>&</sup>lt;sup>122</sup> See GC Exh. 5, a metal analysis log for February 27, 2003. This form is retained in the quality laboratory throughout the working day and covers all shifts. This very metal analysis log figures significantly in the charges pertaining to Turney and Richmond.

<sup>123</sup> Turney says his other duties as a lab tech included performing a tensile test, which is performed on products that have been returned from heat treatment, an outsourced procedure. The test consists of cutting the parts so as to test them for stress and strength. Turney's other duties included parts inspection and occasionally relieving the foundry techs on break

This is the aforementioned noted GC Exh. 5.

he was asked similarly about tests done on crucible 11 at 6 p.m. and then again at 6:45 p.m.

Turney said that he told Reed that the discrepancy could be due to materials contamination which would halt the testing. However, Turney said that he acknowledged to Reed that it was simply a mistake in recording the crucible numbers.

According to Turney, Barry then asked him if he realized the seriousness of the issue, to which Turney said that he did. Turney said he was familiar with a similar problem with questionable parts that occurred in 2001 that required the Company to search for and ultimately retrieve parts from a customer, an automobile dealership. Accordingly, Turney said that he told the managers that he realized the problems associated with a mixup. Reed then said that the Company should notify the customer (Delphi) and advise them of the mixup because metal traceability was compromised since it was not known whether the metal had been actually tested.

Barry then asked him about his initials, specifically whether he had given Lenora Richmond permission to use his initials. Turney said that he told Barry that he had not. Barry also then asked whether he, as a normal procedure, asked Richmond to keep his name in the computer as the operator when she was actually running the spectrometer tests. Turney said that he denied this, but did acknowledge to Barry that he had asked Richmond on occasion to leave his name in the computer. 125 Turney said that he told the managers that he took full responsibility for what took place in the lab to the extent any mistakes were made.

Barry told Turney that he was suspended for the balance of the day but to report the following Tuesday when the Company had completed an investigation.

Turney said that he reported to work on March 4, 2003, and again met with Reed, Guthy, and Barry, who gave him a letter notifying him of his termination effective that very day for basically three reasons—failing to follow proper procedure to ensure full metal traceability, improperly instructing Richmond to enter data under his name, and permitting Richmond to falsify documents by allowing her to use his initials. The letter also noted that Turney admitted that he violated the procedure and acknowledged the seriousness of his actions. Turney said that the managers were all in agreement that termination was

the appropriate action based on the Company's investigation on which Barry told him he had spent 4 to 5 hours.

The General Counsel asked Turney to explain the February 27, 2003 discrepancies with the crucibles in light of the Company's claim that his actions had resulted in a loss of metal traceability. Turney identified several subpoenaed crucible approval sheets which he had initialed that accounted for the discrepancies on the metal analysis sheet of February 27. Turney testified that the issue with crucibles arose because he mistakenly entered a number 6 when he should have entered a number 9 in the metal analysis log for the 6:35 p.m. entry and the spectrometer report for this crucible. 127

Turney said that a similar discrepancy occurred because he entered "11" in the metal analysis log for the 6:45 p.m. entry instead of the actual number 14. He acknowledged his mistake at the hearing but said he did not have all of these documents when he met with Barry on February 28. However, disputing Barry's claim that metal traceability was lost, Turney said that a metal trace can be done using cookies; moreover, it is possible to rerun the tests on the spectrometer, something that he has done with the new machinery. Turney noted that the Company in the past has quarantined questionable parts but he was not sure if this was done in this case. According to Turney, Guthy would be the one to quarantine such parts and he did not know if any retesting was undertaken by the Company. In any case, in his view, Turney felt that metal traceability was not lost because the documentation—the appropriate crucible approval sheets and spectrometer reports—would disclose the true crucible numbers. Turney said that in spite of his mistake with crucibles 11 and 14 and 6 and 9, the Company could determine whether proper testing had been accomplished.

Turney admitted that he did not personally initial the metal analysis log (for February 27) with regard to entries at 6 p.m. (crucible 11), 6:15 p.m. (crucible 4), 8:55 p.m. (crucible 16), and 10:05 p.m. (crucible 11). Turney also admitted that as of November 2002, he had told Richmond that she could leave his name in the computer as opposed to putting her name in when he was simply on break, even if she was entering the information. 129

Turney also admitted that he told Barry at the suspension meeting that he was not "really worried" about Richmond initialing for him, that "she just initialed that the work was done." (Tr. 89.)

<sup>&</sup>lt;sup>125</sup> Turney said that there were three lab workers on each shift. When he arrived on second shift, he took the first shift's operator's name off the computer and entered his. According to Turney, he and Richmond discussed a procedure to deal with their respective testing procedures in November 2002. Under their arrangement, Turney said that Richmond would enter her name in the computer in place of his when she ran tests. Turney said sometimes he did not realize she was doing this when he was on break. When he returned, he belatedly noticed that he was running his tests in her name. Turney says he became worried about this because of company inspections. So he told Richmond when he was away for only 10 minutes to leave his name in the computer so he would not forget to remove her name from his tests. He said that Richmond agreed to do this.

Turney identified the letter which is contained in GC Exh. 10. The letter cited examples of what the Company claimed were losses of metal traceability and Turney's failure to document inspection findings on the metal approval sheets.

<sup>&</sup>lt;sup>127</sup> Turney identified GC Exh. 6, the crucible approval sheet for crucible 9 which he initialed for approval at 6:45 p.m. on February 27, 2003. GC Exh. 7, a spectrometer test sheet, shows that crucible # 6 was tested at 6:35 p.m. However, Turney admitted that this was his mistake also because the crucible being tested was #9.

<sup>&</sup>lt;sup>128</sup> Turney identified GC Exh. 9, a spectrometer tested at 6:45 p.m. Turney also identified GC Exh. 8, the crucible approval sheet for #14 which, although stating an erroneous entry time according to Turney, matches the density reading for crucible #14 and therefore was traceable.

able.

129 Turney said that the affidavit he gave to the Board agent in which he told Richmond she could leave her name in the computer in February 2003, may be incorrect. He recalled doing this in November 2002. Turney said that in November 2002, Richmond said she preferred that he run the spectrometer.

Lenora Richmond testified that she began working for the Respondent on December 22, 1997; her last position was process monitor working on the second shift in the qualify lab for the past 1-1/2 years.

Richmond stated that she was aware of the Union's organizing campaign and, in fact, participated in activities in support of the drive, such as signing the representation petition (on February 12, 2002) and attending meetings at the union hall.

Richmond said that on February 27, 2003, she was working in the lab along with coworker Tom Turney with whom she had worked about a 1-1/2 years. Richmond said that her job included running the computerized spectrometer that is used for metal chemical analysis. According to Richmond, she and Turney had an arrangement wherein they stood in for each other at breaktimes and, pursuant to their arrangement, discussed leaving his name in the computer. However, Richmond said that she was concerned about an impending quality inspection by the Company so she tried "to keep everything in order." (Tr. 104.) So on February 27, Richmond said that she initialed Turney's name on the metal analysis log and the crucible approval sheets and returned them to the foundry.

Richmond related that on February 27, Turney told her he needed to be relieved and asked her if it were alright to leave his name in the computer because he might forget to reenter his name. Richmond said she agreed because they worked together and with the quality inspection coming up, she kept his name in the computer and all entries went in under this name in the computer. She also initialed his name on the pertinent forms.  $^{130}$ 

Richmond said that she was called to a meeting with Reed, Guthy, and Barry, who showed her what she recalls as the February 27 metal analysis logsheet. Richmond admitted to Barry that she had initialed the log for Turney because they were really busy. Barry said that she should not have done this irrespective of how busy she and Turney were. Richmond said she told Barry that it was bad judgment on her part but that she and Turney worked together and that the entries were made for only a short period while Turney was on break; that she was simply trying to keep things straight and that Turney had asked her to keep his name in the computer. Richmond said that she told Barry that she had entered Turney's initials and the time and date of the test results on the log for these reasons and because of the upcoming lab inspection.

Richmond said that Barry did not ask her if Turney had given her permission to enter her initials on the logsheet. 132 However, at the end of the meeting, Barry informed her that she was going to be suspended for 3 days, pending an investigation by the Company.

At the hearing, Richmond acknowledged that it was Turney's idea to keep his name in the computer because he feared forgetting to reenter his name when he returned from breaks. However, Richmond emphatically insisted that other than this instance, she regularly put her name in the computer w hen she was performing the tests. At the hearing, she admitted that it was wrong to enter in the computer information under Turney's name but felt that this was not a dischargeable violation. 133

Richmond said that she was ordered by Barry to return to work on March 4, 2003, but because of a vacation day, she reported on March 5 and was given a termination letter which stated that her discharge was based essentially on her failure to follow company procedures and falsification of company records stemming from the February 27 quality inspections.<sup>1</sup>

The General Counsel argues that the Respondent's suspensions and discharges of both Turney and Richmond were disparate to its treatment of other employees who committed violations of company rules or policies, because of their union involvement. He called several witnesses to establish his argu-

Marcy Klug testified that she has been working for the Respondent for about 8 years as a finishing tech and final pack leader on the third shift (11 p.m. to 7:30 a.m.); she has been working as a casting salt tech at the Stevensville plant since October 2003.

Klug stated that she knew a coworker, Tabitha Baker, whose regular job was a finishing tech but on March 14, 2003, was serving as a furnace minder or monitor. Klug stated that this assignment, called guard duty, required Baker periodically to check and record the temperature readings of the furnace, answer phones, and make sure that unauthorized persons were not on the premises. 135 Klug said that she reported for work that night about 7 to 7:30 p.m. <sup>136</sup> and noticed that Baker was stationed in the tool room office. Klug said that she was working in the final pack area, which is close to the tool room (right around the corner from the tool room office), and observed Baker, on two occasions around 2:30 and 3 a.m., seated the first time at a desk, eyes closed in apparent sleep; and the second time with her head down, eyes closed, a jacket draped over her head, and feet up in a chair.

Klug said that around 5:30 a.m., she answered the phone, although it was Baker's responsibility, and took a call from Baker's husband. Klug asked another worker. Joe Harding, to inform Baker of the telephone call.

Klug stated that on that same day she spoke to a supervisor, Rick Birkhold, about Baker's behavior and actually observed Birkhold go into the office where Baker was stationed. Klug

<sup>130</sup> Richmond acknowledged initialing for Turney on GC Exh. 3, the February 27, 2003 crucible approval sheet for crucible #5, and GC Exh. 5, the metal approval sheet for February 27.

<sup>131</sup> Richmond said that things were going so fast at the time that she could not precisely recall whether she told Barry all of her reasons, but she certainly recalled discussing initialing for Turney.

<sup>132</sup> Richmond denied ever telling Turney that she did not want (or prefer) to use the spectrometer.

<sup>133</sup> Richmond said she told Barry at the meeting that she knew it was wrong to enter Turney's name in the computer. She also said she may have told Barry that Turney authorized her to sign his initials on the metal analysis log. Richmond, in fact, acknowledged having initialed for him in the same places in the log that Turney acknowledged. Richmond also acknowledged that another process monitor coworker, Betty Scott, told her on February 27 that it was wrong to enter information in the computer in Turney's name.

<sup>134</sup> Richmond's letter is contained in GC Exh. 11. It is, like Turney's, signed by Barry.

135 Klug said she worked 4 hours overtime that Friday night.

<sup>136</sup> Klug admitted she never served as a guard but the handbook informs that guards should inspect the furnace once an hour.

stated that she was never contacted by management about the matter. Klug denied that she wanted to get Baker in trouble.

Joe Harding<sup>137</sup> testified that he knows Baker and recalled relaying a 5 a.m. telephone call to her while he was working the third shift final pack assignment on March 14, 2003. He recalled that Klug answered the phone and asked him to tell Baker her husband was on the line. Harding said that when he saw Baker, she was sleeping and he woke her up to give her the message. Baker took the call and Harding went on to his other assignments. Harding stated that management never contacted him about the incident.

The General Counsel called Baker as his witness. Tabitha Baker testified that she has worked for the Respondent since 1988, and is currently employed at the Stevensville plant as a group leader in the finishing department. Baker stated that she has worked as a guard on occasion.

Acknowledging that she was very opposed to the Union and wore antiunion T-shirts, hat, and buttons, and testified at the Intermet I hearing, Baker also acknowledged that she was once accused of sleeping on the job in March 2003; and she spoke with Joe Barry and Valerie Ortiz, the finishing department head, about the matter.

Baker said that she told them that she had not been sleeping on the job, that the furnaces had to be checked every 2 hours and the documents reflect this; checking the furnaces requires walking around and taking and recording the temperature readings. <sup>139</sup> She also told them then that Wagner could vouch for her. Baker said that she later met with Barry alone in his office and again denied sleeping on the job. She said that Barry met with her about 2 to 3 days later after he evidently had conducted an investigation, since he asked her additional questions. Baker said that ultimately she was told (by Barry) that she could not sleep on the job and perform the guard duty (an overtime opportunity). However, according to Baker, it was never proven that she was sleeping on the job.

The General Counsel also called current employee Albert Bownes<sup>140</sup> regarding a matter involving a mixup in the sampling and testing of metal in August 2003, when he was working as a foundry technician on the second shift with another current employee, Tim Dunn.

According to Bownes, there was a "chaotic" situation in the plant at that time with respect to problems associated with unidentified samples and the crucible approval sheets, especially crucibles 3 and 9. Bownes said he caught a mistake in the density reading of a sample and determined that there were no checkoffs for the RPT tests for several crucibles. At the time a lab tech, Linda Jackson, was running the tests on samples. Bownes later determined that the "pucks and cookies" had not been marked to identify the appropriate crucibles. Bownes, along with the metallurgist Hema Guthy, attempted to track down the problem. Their investigation led them to Dunne, the foundry tech responsible for making up the samples but who evidently had not been marking the samples. Bownes also determined that Jackson had approved crucibles that she should not have; additionally, the investigation disclosed that there was no crucible approval sheet for 9, yet this crucible was approved by Jackson at 4:37 p.m. on August 15.

Bownes said that the problem with Jackson's handling of crucibles 3 and 9 was discussed with Supervisor Preston Eastep (later in the shift) who told him he (Bownes) had to be more careful. According to Bownes, Hema Guthy was very angry over the situation because crucibles 3 and 9 had to be retested, which caused downtime of as much as 25 minutes.

Bownes said because Dunne did not mark the samples for crucibles 3 and 9 as he should have, there was a traceability issue. However, there was no actual loss of metal traceability because he (Bownes) caught the problem and retested these crucibles himself. Bownes said that Jackson's mistakes were significant also. He noted that Jackson seemed to be indifferent to the problem, considering that he had to argue with her on August 15 about the necessity of having Dunne properly mark the samples. He noted that Jackson, to his knowledge, simply quit some time after August 15. Bownes said that because he caught her mistakes, there was no loss of metal traceability.

Bownes said that he did not believe that Jackson or Dunne received any discipline for their actions. <sup>141</sup> According to Bownes, Dunne was against the Union and spoke loudly about his opposition and wore a button that said "vote no." <sup>142</sup>

# The Respondent's Defense to the Turney and Richmond Discharges

Barry testified that on the morning of February 28, Brandon Reed brought to his attention matters he thought were in the nature not only of lost metal traceability, but potential falsification of documents on the second shift the night of February 27. Evidently, Reed had done some prior investigation of the matter and advised Barry of the problems. Harry said that he instructed Reed to have the metallurgist, Hema Guthy, gather all the available documentation for the shift in question, and the three of them met and discussed the matter. The three examined the February 27 metal analysis log, the crucible approval sheets, and computer documents to determine the parameters of

<sup>&</sup>lt;sup>137</sup> Harding is a current employee who stated that he has worked for the Respondent for about 9 years. He has been assigned to final pack as an inspector of steering knuckles for the past 3 to 4 years.

<sup>&</sup>lt;sup>138</sup> Harding explained on cross-examination that Baker was facing the window when he knocked on the door and "she just woke up." Harding stated that Klug suggested that he park his lift truck by the tool room office so that when Birkhold came by, he would see Baker sleeping. Harding said that he did follow this suggestion, but could not say whether Klug wanted Baker to get into trouble.

<sup>&</sup>lt;sup>139</sup> Baker, who was shown a furnace check log dated March 14, 2003 (GC Exh. 51), said that the sheet could be related to her serving as guard that day. The document reflects that temperature entries and other notes were made at 1, 3, and 5 a.m.

<sup>&</sup>lt;sup>140</sup> Bownes said that he has been employed by the Company for about 3 years. Bownes is now working on the first shift (7 a.m. to 3 p.m.) and serves as the head foundry technician or lead tech. Bownes said his duties as a foundry tech included making metal analysis checks and charging the furnace.

<sup>&</sup>lt;sup>141</sup> Bownes said that Dunne returned to work the next day. He currently is working on the second shift in the foundry.

<sup>&</sup>lt;sup>145</sup> Bownes said that he (Bownes) did not openly support the Union or management in the organizing campaign.

<sup>&</sup>lt;sup>143</sup> Reed did not testify at the hearing. The Respondent did not give a reason for his nonappearance.

the problem, if any. According to Barry, the three of them basically examined the available documents page by page, trying to match the crucibles with the other documents in a chronological order. In the end, Barry said they arrived at a summary of the second-shift activities and committed these to a chart<sup>144</sup> which chronologically, by crucible number log sheet, approval sheet, and computer document, attempted to reconstruct the pertinent events of February 27 in which Turney and Richmond were involved. Barry stated that the chart was based on the information the Company had available then. Barry admitted that if he were to do the chart over, he would match the times for crucible 11 which would eliminate a traceability issue with respect to that crucible. He also admitted that his chart was also incorrect where it indicates that crucible 14 was approved at 5:55 p.m., but only based on the documents regarding that crucible adduced at the hearing. 145 However, Barry insisted that his chart was accurate in all other respects, especially in terms of the two employees improperly entering information in the computer for the other.

Barry confirmed that he met with Turney and Richmond. According to Barry, Richmond admitted that she had initialed for Turney on more than one prior occasion and realized that she should not have done this. Barry said that in response to his query, Richmond said that Turney had instructed her not to take his name out of the computer when she, in fact, was doing the metal checks because this was too hard to do. Barry said that Richmond, however, acknowledged that she had been trained on replacing names in the computer and that actually this was not a difficult task. Richmond also acknowledged that Turney was not her supervisor. Barry stated that he informed Richmond that it appeared that metal traceability was lost, and placed her on suspension pending the completion of an investigation.

Barry said that he met with Turney and asked similar questions of him regarding the substituted initialing matter. Turney admitted that Richmond initialed the test results for him and, in fact, that he instructed her to use his initials; Turney said on some occasions he simply forgot to change the names in the computer and asked Richmond to use his name in the computer, knowing full well this was not proper procedure.

Barry admitted that he somewhat accusingly asked Turney if he thought that because he (Turney) could not perform his job correctly, he would instruct someone else to violate procedures. Turney, according to Barry, simply shrugged and kind of threw his hands into the air. Barry said that Turney told him that when hurried, he did not perform the checks that he should have and was not as observant as well.

After the meeting, Barry said he suspended Turney. Barry then met with Turney on the following Tuesday, and Wednesday with Richmond. Barry said that he went over with them the chart that he had prepared; ultimately, both were terminated and issued letters to that effect.

Barry stated that the two were terminated because they violated company procedures designed to ensure metal traceability and falsified documentation; and that their union activity or support had nothing to do with their suspensions or discharges.

Regarding the Tabitha Baker matter, Barry said that he was aware of the charges that she was allegedly sleeping on the job while performing guard duty. According to Barry, after some investigation, he could not conclude that she, in fact, had been sleeping while on duty. He noted that other employees—Marsha Loomis, for instance—had been known to read books while performing guard duty. Junior Baker (an alleged discriminatee) used to bring in vehicles and work on them while on guard duty; others had brought in televisions.

He also noted that guard duty was essentially a weekend job outside of the employees' regular duty and when the guard is not checking the furnaces, they are free or have been free in the past to do other things.

Barry said that Tabby Baker denied sleeping on the job. Moreover, according to Barry, even if she had been, there was no violation of any company policy, for example, falsifying the furnace log book. <sup>146</sup>

Hema Guthy, <sup>147</sup> the Respondent's metallurgist, testified that he knew Richmond and Turney and, in fact, had trained them (and others) on testing machines and the pertinent procedures and related documentation associated with the production of the steering knuckles; they both worked the second shift in the lab.

Guthy essentially corroborated Barry's version of the Company's handling of the two employees. Guthy stated that he assisted in the investigation of Turney and Richmond and helped prepare a chart or summary of the metal analysis log sheet, the crucible approval sheet, and the computer document for the second shift on February 27. Guthy stated that the Company's investigation determined basically that Richmond was signing off on the lab tests using Turney's initials; that she actually performed certain of the tests of the metal but Turney was listed in the computer as the operator. As to Turney, the Company determined that Turney knew that Richmond was entering information under his name; that he told her to leave his name in the computer, observed her signing off using his initials, and took no corrective action or otherwise said anything to her. Guthy also noted that both Richmond and Turney admitted their actions in the meeting.

Guthy also stated that Richmond and Turney's conduct presented issues of metal traceability because of the mixup of cru-

<sup>&</sup>lt;sup>144</sup> Barry identified R. Exh. 102 titled evaluation of metal traceability second shift Thursday February 27, 2003, as the chart he prepared. Barry said he prepared this document as part of his investigation and in anticipation that the matter probably would be the subject of an unfair labor charge.

<sup>&</sup>lt;sup>145</sup> Barry, while testifying, evinced some concerns about the authenticity of these documents, which he seemed to insist were not available when he was researching the problem.

<sup>&</sup>lt;sup>146</sup> The Respondent called its current production manager, Rick Birkhold, to corroborate Barry's opinion that Baker did not engage in falsification of the furnace report. Birkhold stated that he saw Baker at 5:40 and 5:50 a.m. on March 15, but did not observe her sleeping on the job during the first 20 minutes of any hour. Birkhold said he had no reason to believe she falsified any document on March 14 or 15, 2003. Birkhold is an admitted supervisor.

<sup>&</sup>lt;sup>147</sup> Guthy is an admitted supervisor and/or agent within the meaning of the Act. Guthy has worked for the Respondent for about 3 years and has served in the capacity of metallurgist the entire time. He possesses a bachelor's degree in metallurgical engineering and a master's degree in material science and engineering, specializing in metals.

cible numbers<sup>148</sup> and, because Richmond signed for Turney, it would be impossible to accurately trace who actually performed the test to resolve possible problems with the crucibles. According to Guthy, the falsification of the documents compromises metal traceability and under no circumstances is it ever acceptable at Intermet to sign someone else's name. <sup>149</sup> Guthy stated that aside from the falsification issue where one person signs for another, the entire verification process is brought into question, most especially whether the test actually was conducted and conducted properly. Guthy explained that the Company's test procedures are particularly important in the manufacturing of steering knuckles, which are structural safety-related and government-regulated parts for automobiles that have to be "good every time and all the time."

Guthy confirmed that both Turney and Richmond admitted in the meetings their involvement in breach of the procedures by improperly signing off on the samplings. <sup>150</sup> Guthy stated that he ultimately agreed with Barry and Reed that the two should be terminated because of their misconduct. Guthy denied that Richmond and Turney were discharged because of their union activities or because Turney testified at the prior Board hearing.

Guthy acknowledged that foundry worker Tim Dunne was not writing the crucible numbers on the crucible samples (the K-mold RPI tests) themselves as he was required to do; that this posed a metal traceability issue. Guthy said that he told Dunne that this was not acceptable and instructed him to write the crucible numbers on each and every sample and also ordered him to redo the sampling of the pertinent crucibles.

Guthy acknowledged that the chart he helped prepare was not totally accurate as evidenced by facts brought out in the hearing, namely that there was no metal traceability issue with respect to some of the suspect crucibles. However, Guthy maintained that there was, nonetheless, an issue of metal traceability at the time because of Turney and Richmond's handling of the testing procedures.

On balance, Guthy stated that in his view, Richmond was terminated because she performed tests for Turney and signed off in his name as opposed to her own and not so much because of a loss of metal traceability. Turney was discharged because, in management's view, metal traceability was lost because of the many mistakes he made in the documentation.

#### C. The Complaint Allegations Involving Randy Penley

In paragraph 9(c) of the complaint, the Respondent, through Valerie Ortiz, allegedly issued disciplinary warnings to Penley on September 12 and 20, 2002.

The complaint alleges in paragraph (j)(2) that on or about May 28, 2003, the Respondent, through an admitted supervisor, Preston Eastep, allegedly changed Randy Penley's job requirement as a furnace maintenance technician.

In paragraph 9(r), the complaint alleges that through Eastep on or about August 26, 2003, the Respondent assigned Penley duties previously performed by two other employees, in addition to his regular furnace maintenance technician duties. Paragraph 9(s) alleges that by dint of its conduct alleged in paragraphs 9(j)(2) and (r), the Respondent caused the voluntary termination of Penley. The complaint charges that the Respondent engaged in its conduct against Penley essentially because of his union involvement and because of his testimony in the Intermet I hearing, in violation of Section 8(a)(3) and (4) of the Act.

#### 1. The September 2002 disciplines of Penley

Penley testified at the hearing, stating that he had worked for the Respondent for a little over 4 years, from around July 1999 through September 4, 2003; his last position was foundry maintenance technician working the first shift, a position which he held for about a year before he left the Company. Penley said that he was promoted to the foundry position on April 12, 2002, from the finishing department.

Penley stated he was aware of the union organizing campaign and considered himself an open supporter, one who wore pins and hats supportive of the Union. Penley said that he attended all union organization meetings and signed the representation petition. Penley said that he also testified at the *Intermet I* hearing. <sup>151</sup>

Penley also noted that the day after he testified at the prior hearing, he was called to the front office by Valerie Ortiz who questioned him about his arrival time from the hearing and told him that she knew that he was supposed to go to his residence to look for and retrieve some paperwork related to his testimony. 152

Turning to the disciplines he received on two occasions in September 2002, Penley explained that his duties as a furnace maintenance technician required use of the Company's shield-protected forklift which he used to clean the furnaces and perform his other furnace-related responsibilities.

On September 16, 2002, Penley said that he was working in the foundry area and Valerie Ortiz asked him to retrieve a full hopper from the manual saw area, dump its contents and then place a smaller empty hopper back at the saw. Penley said that while maneuvering his forklift around the cluttered work area

<sup>&</sup>lt;sup>148</sup> Guthy explained at length the importance of having metal traceability so that the Company can ensure itself and its customers that the metal point has integrity—clean, free of impurities, has the correct chemical makeup, and has reduced gas content—so that the final product meets customer specifications for strength and hardness. Guthy stated that quality lab workers like Turney and Richmond are required to perform the checks on all samples and document accurately the results so that good metal is used to make these vital parts.

<sup>&</sup>lt;sup>149</sup> Albert Bownes, a foundry tech called by both the General Counsel and the Respondent, stated (emphatically) that he never wrote someone else's initials on a crucible approval sheet or entered information in the spectrometer and on the metal analysis logs, saying "you cannot do this, this would be falsifying a document." (Tr. 1826.)

<sup>150</sup> Guthy also noted that Richmond was at the time observed by an employee on the third shift, Betty Scott, signing off with Turney's initials at the end of the second shift. According to Guthy, Scott saw Richmond entering Turney's initials when she, herself, was performing the tests. Guthy stated the investigation of the entire matter originated with Scott's observation. Scott no longer works at the Company. She did not testify at the hearing.

<sup>&</sup>lt;sup>151</sup> GC Exh. 2. Penley identified his signature on this petition, and it is not disputed that he testified at the prior *Intermet I* Board hearing.

<sup>&</sup>lt;sup>152</sup> This alleged incident is not charged as a violation in the instant litigation.

to get the full hopper away from the saw, he accidentally bumped into one of the parts cages. Penley said that he observed Ortiz and another person from human resources whose name he did not know standing nearby. Ortiz evidently observed his hitting the cage and, according to Penley, yelled out to him, asking where was his seat belt. Penley said he pointed to his waist, indicating that the forklift did not have a seat belt installed. Ortiz thereupon told him to put in a work order to have a belt installed.

Penley said he turned in a work order as instructed before he left for the day. Penley noted that this forklift was the only shield-protected one and that the seat belt had been missing for about 2 weeks because maintenance had changed the seat on the unit and had not replaced the belt. Penley also noted that the cage he bumped was indeed full of parts, but none fell out or were damaged; there was also no damage to the lift or the cage.

The next day (September 17, 2002), Penley stated he was called to the office of his supervisor, Hema Guthy, where Guthy issued a written warning to him for reckless driving of the forklift and not wearing a seat belt.<sup>153</sup> According to Penley, Guthy said that the warning was no big deal but that he should slow down and always wear the seat belt.

Penley said that on September 18, he again was working in the foundry area and had just picked up a furnace dross tub with the shielded forklift and was proceeding to back up when he heard someone yell, where is your seat belt? Penley observed Ortiz and Barry standing nearby evidently observing him.

Penley said he dismounted the forklift to close the furnace door, whereupon Barry inquired as to why the furnace door was open. While explaining the situation to Barry, Ortiz asked again where was his seat belt. According to Penley, he explained to her that he was about to get off the lift to close the furnace door and was going to put his belt on; that he had only driven about 10 feet at the time she evidently observed him. <sup>154</sup> Later that same day, Penley said that, while on break, Zoe Burns asked him to assist in the shipping department and told him to be sure to wear his seat belt before someone sees him. Penley said he was seated on the forklift at the time but was not operating it.

On September 19 at about 3 p.m., Penley said that he was called to Barry's office by Guthy. Penley stated that Ortiz, not Barry, was there when he arrived.

Ortiz informed him that he had been observed not wearing his seat belt on two occasions the day before while operating the forklift, and would be issued another written warning. On September 20, Penley said that he received another written warning for a safety violation signed by Guthy which referred

to observations by Ortiz, Barry, and Burns of his not wearing his seat belt. 155

Penley noted that at the time of his first discipline, the shielded forklift (then without the belt) was also being used by employee Albert Bownes, a second shift foundry worker. Penley said to his knowledge, Bownes was not ever disciplined. He also noted that when Ortiz mentioned the seat belt on September 16, she did not tell him immediately to cease using the forklift which Penley insisted clearly was then in service without the seat belt.

Penley admitted that before being written up, he never wore the seat belt and did not think it was a requirement—"a golden rule [in his words] that you had to go by." (Tr. 416.)

The General Counsel called furnace technician Dior Turner 157 to testify about the forklift matter. Turner stated that his supervisor in the foundry was Guthy. Turner said that he operated the foundry's shielded forklift as part of his regular duties

According to Turner, the foundry's shielded forklift did not have a seat belt but around the time of the union campaign, one was installed along with a number of other corrective measures initiated by management contemporaneous with the organizing effort; he was not more specific about the timeframe. Turner said that he spoke to the then safety director, Charles Goldfuss, about the seat belt on more than one occasion, but nonetheless operated the forklift without a safety belt. Turner said that he was never disciplined for not wearing a belt. Turner also stated that he too had bumped into things while operating the forklift because the operating space was tight and positioning the forklift to move the hoppers around often resulted in some unavoidable bumping, usually with no damage. According to Turner, bumping into things happened practically on every shift he worked, so much so that the fellow employees and supervisors would joke about where he had gotten his license. 158 Turner said that he could not recall ever being disciplined for reckless operation of the forklift.

Turner said that he, personally, did not support openly either the Union or management during the organizing campaign.

Jerry Wayne Neville<sup>159</sup> testified that he is currently employed as a materials handler for the Respondent, working the 7

<sup>&</sup>lt;sup>153</sup> See. GC Exh. 33, a copy of a warning issued to Penley by Guthy, his supervisor. The warning stated, inter alia, that if the seat belt were not functioning, Penley should submit a work order for repair. Penley signed the discipline form without providing any explanation for his part in the incident.

<sup>&</sup>lt;sup>154</sup> Penley noted that the shielded forklift had the seat belt installed by this time.

<sup>&</sup>lt;sup>155</sup> Penley's second warning is contained in GC Exh. 34. This warning also stated that Penley would be ineligible for increases at review time and would also affect his being considered for promotions. Penley was warned that any other safety-related incidents may result in his discharge. Penley also signed this warning notice without providing any comments although this form contained a space for employee comments.

<sup>&</sup>lt;sup>156</sup> Penley also stated while on cross-examination, "I am not saying that I did not know I was required [to wear a seat belt]. I knew I was required, but no one else wore theirs until I got wrote [sic] up." (Tr. 418-419.)

<sup>&</sup>lt;sup>157</sup> Turner testified that he has worked for the Respondent since July 7, 1999. He stated he was currently on workers' compensation disability since June 2003. Turner worked on the first shift.

<sup>158</sup> Turner identified among those observing him hit items on the plant floor—Preston Eastep, an admitted supervisor; and Ray Turner and Robert Potter, both of whom Turner said were supervisors.

<sup>&</sup>lt;sup>159</sup> Neville stated that Penley worked the first shift in the foundry and that he had observed him working there.

a.m. to 3:30 p.m. (first shift). Neville said that as a materials handler, his duties include operating a lift truck and that the Company currently has five in the plant. Neville stated that at one time—he was not sure of the timeframe—the Company only had two lift trucks, neither of which had seat belts, but he operated them nonetheless; Neville also noted that those older machines were no longer in service. According to Neville, he was not aware that seat belt usage was required at the time and he never reported this matter to anyone in management. Neville said he was never disciplined for not wearing a seat belt. However, Neville acknowledged that once the seat belts were installed on the company machines, he always wore one.

The Respondent called Barry, Guthy, Zoe Burns, and Maze as its principal witnesses regarding the Penley disciplines.

Barry testified that regarding Penley's written discipline on September 20, he observed the whole episode firsthand in the presence of Valerie Ortiz. 160 Barry said that he and Ortiz were in the foundry area near a reverberation furnace when Penley came around the corner on the forklift with a full dross tub resting on the forks. Penley was operating the vehicle with his seat belt disengaged. According to Barry, Ortiz told him to hook his belt; Penley stopped and complied. Barry said Ortiz told him at the time that Penley's not wearing the seat belt was frustrating because she had ordered him disciplined 2 days prior for the same infraction, along with a citation for reckless operation of the lift because he had run into some baskets (cages) containing parts. Barry noted that reckless operation of the Company's machinery is grounds for discipline.

Guthy explained his involvement in Penley's disciplines, noting preliminarily that Penley, the first time he met him, had just returned to work, having recuperated for the past 4 to 5 months from a safety related on-the-job injury suffered by him when the Company was operating the old business. During this initial meeting, Penley explained to him (Guthy) how he had injured himself.

As to the warnings he issued Penley, Guthy said that he issued the first warning to Penley on September 17, 2002, stressing to him that he had to work safely and reminding him that he had previously lost time off for a safety-related issue; that Penley needed to watch out for himself and the Company. Guthy said he issued Penley the second warning on September 20, based on Penley's having been observed by managers again not wearing his seat belt while operating the forklift. Guthy said he was concerned about Penley's receiving two safety-related disciplines within only a few days and decided to counsel him

Guthy said that he tried to impress upon Penley the need to wear the belt and generally following safety rules for his own sake. According to Guthy, Penley responded, saying he did not even wear a safety belt while driving his truck, so why should he wear one while operating the forklift. Nonetheless, Guthy said because Penley seemed genuinely saddened by the writeups, he tried to cheer him up, saying that the violation was no big deal but that he (Penley) had to follow the rules and then all would be well. Guthy said that he told Penley he would not be

fired but that the warnings were issued to get him to pay attention to the safety rules to avoid his getting hurt. That was what Guthy said he meant by "no big deal." Guthy denied that the disciplines were connected to Penley's union activity or his testimony at the prior hearing.

Zoe Burns testified about other dealings with Penley. Burns stated that she supervised Penley, a foundry tech, during the time she worked for the Company and was responsible for oversight of the foundry. <sup>161</sup> Burns stated that she evaluated Penley's performance around July 17, 2002, and while generally considering him a good worker and deserving a raise at the time, he, nonetheless, needed improvement in his operation of the forklift; specifically, he needed to be watchful of his operation to avoid safety issues and damage, and not to hurry. <sup>162</sup> Burns noted that she had observed Penley's operation of the forklift when he worked for her and he rushed to get jobs completed and sometimes bumped into things. Burns said this was an issue for her because safety always came first at the plant.

Burns viewed Penley otherwise as a good and willing employee and, in fact, stated that she interviewed and hired him in April 2002 to work for her; that this was a promotion for Penley. Burns stated that she authorized another wage increase for Penley on July 24, effective July 29, 2002. 164

Burns did not address the disciplines that were issued to Penley on September 16 and 20 and in particular the September 18 incident in which she was implicated.

The Respondent also called Maze, of human resources, who testified that Penley incurred another safety violation other than the two in September 2002. Maze stated that on January 22.

<sup>&</sup>lt;sup>160</sup> Ortiz did not testify at the hearing; she is no longer employed by the Respondent.

<sup>&</sup>lt;sup>161</sup> Burns worked for the Company from around April 2001 through about March 2004 and held the title of project manager.

<sup>&</sup>lt;sup>162</sup> See R. Exh. 8, Penley's individual evaluation form dated July 15, 2002. Burns considered Penley an above average employee, recommending an increase in wages for him but stating that he should "Watch fork lift driving—safety/damage—don't rush."

It should be noted that Penley, when shown the July evaluation, acknowledged his signature on the form but not the attachment on which Burns made her remarks about his operation of the forklift. Penley believed that someone wrote in "See Attached" because his copy did not have an attachment. Contrary to Burns, Penley said no one verbally went over his strengths and that he did not view his stated willingness to help around the plant a "strength." Penley said he signed the review because he was receiving a raise but did not sign any attachments to the July 2002 evaluation.

It is also notable that Burns identified her evaluation for another employee, Lisa Cogswell, in May 2002, which followed the format she testified she applied to Penley (see R. Exh. 10). Burns said that she went over the evaluation with Cogwell in the identical fashion with Penley—page-by-page and discussing the attachments that she customarily included with her evaluations.

fos Burns identified R. Exh. 11, a status payroll from showing Penley's transfer from the PCP finishing department—third shift—to the PC foundry—first shift—on April 12, 2002; and she also identified R. Exh. 12, a status payroll form dated May 30, 2002, showing that Penley was to receive a raise from \$13 to \$13.25 per hour effective June 3, 2002, based on his having performed well for the past 30–45 days. Barry approved of both the transfer and the increases.

<sup>&</sup>lt;sup>164</sup> Burns identified R. Exh. 13 as the payroll form she signed authorizing Penley's increase in July 2002. Barry approved of the raise on July 28, 2002.

2002, Penley was cited for failure to wear a safety harness and failure to lock out the die cast machine. <sup>165</sup> Maze also noted that on that same date, Penley was written up with a formal written violation of the Company's substance abuse policy <sup>166</sup> for which he received 3-day suspension. Maze said the two violations were related in that Penley injured himself as a result of the safety violation. As a result of the substance abuse violation on about January 22, 2002, Penley signed a last chance agreement, which, in part required him to undergo future random drug testing; a positive result would result in his termination. <sup>167</sup>

Maze pointed out that other employees who incurred safety violations or had violated the substance abuse policy were issued disciplines similar to Penley over the years. <sup>168</sup>

Maze stated that Penley was required to be able to operate a powered lift truck as a foundry maintenance tech and that he had a valid operator's license (R. Exh. 17). Furthermore, company policy required this license (R. Exh. 18). Maze also noted that Penley passed the written operator's examination on November 13, 1999 (R. Exhs. 19 and 19(a)), which included a question (#11) which asked whether use of the seat belt was mandatory when one was available. (Penley answered this question correctly, in the affirmative.)

The Respondent also called Michael Reitz who testified that he regularly services the Respondent's forklifts. Reitz confirmed that the Respondent had only one forklift—a Toyota—with a shield on it and according to his repair record (R. Exh. 81), he serviced this unit on September 10, 2002, and checked that the seat belts were "good" which meant operable and functional. (Tr. 1219–1220.)<sup>169</sup>

Current employee Albert Bownes testified that he operated the shielded forklift around September 2002 and that the Com-

pany required the operator to wear a seat belt while operating the forklift. (Tr. 1828.)

Another current employee, Richard Hosford, testified that as a third shift foundry maintenance tech, he operated the shielded forklift at the end of 2002. Hosford said that he possessed a forklift license and noted that the Company required use of a seat belt when operating the machinery. Hosford said that he had been disciplined once for not wearing one while operating the lift.<sup>170</sup>

# 2. The change of Penley's job requirements; his assignment of additional duties; and his (constructive) discharge

Penley stated that around the time he testified in Intermet I in September 2002, his duties as a first-shift foundry maintenance tech included cleaning and supplying the furnace, which basically entailed keeping the furnace supplied with metal, dumping hoppers, charging the furnace with T-bars, removing the dross, and then cleaning it periodically.

According to Penley, there were three other workers on the first shift working in the foundry—Dior Turner, Henry (Junior) Baker, and Sylvester Tebo; there was no one assigned to clean the furnace on the second and third shifts.

Penley stated that prior to May 2003, his responsibilities included cleaning four cells and the inside of the furnace, charging (filling) the furnace, dumping scrap and metal hoppers, and changing hoppers at the various machines as well as at the manual saws.

According to Penley, cleaning the cells entailed about 30 to 45 minutes for each and took him an hour to do the inside of the furnace; changing the dross tub took 30 minutes to 1 hour; changing hoppers took from 30 minutes to 1 hour; charging the furnace took about an hour during the entire day; and then cleaning his tools required 30 to 45 minutes per day. Penley stated that in addition to his ordinary hand tools, his duties required the use of the aforementioned shielded forklift.

Penley said that around May 2003, he was assigned more job duties and the pace of work at the plant increased markedly, often with at least five and sometimes all seven casting machines running during his shift. Penley stated the first change in his duties was his being assigned to operate the forklift in the shipping department for the first 2 hours of his shift. Penley identified his first-shift supervisor, Preston Eastep, as ordering the change. According to Penley, Eastep told him that shipping was behind schedule and needed his assistance there. Penley said this was a first-time assignment for him, as he usually would be charging the furnace during the first couple of hours of his shift. Penley said that he was told that the other workers, Sylvester Tebo and Henry "Junior" Baker would be handling this assignment. Penley noted that the shipping assignment lasted for about 2 months.

<sup>&</sup>lt;sup>165</sup> Maze identified R. Exh. 20, a written, documented safety violation for Penley. Notably, Guthy believed this incident caused Penley the injury costing him 4–5 months of time off from work.

<sup>&</sup>lt;sup>166</sup> Maze identified R. Exh. 21 as a copy of the document.

<sup>&</sup>lt;sup>167</sup> Maze identified R. Exhs. 22 and 23 as the documents Penley signed agreeing to the substance abuse and testing program and the last chance agreement, respectively signed on January 22 and February 4, 2002.

<sup>168</sup> Maze noted that employee Charles Ricketts (R. Exh. 24) was disciplined on July 22, 2003, for possession of marijuana; Mark Cook was cited for failure to engage left side safety wedge on December 2, 2002 (R. Exh. 26); Jerry Neville was cited for driving the fork lift at an excessive speed (R. Exh. 27) on November 6, 1997; Henry Baker was cited for spilling metal by not employing safety mechanisms and suspended for 4 days on February 12, 2001 (R. Exh. 29); Jeff Ward was cited for failure to wear a seat belt while operating the power fork lift on February 5, 2003 (R. Exh. 32); Tim Dunne was cited for climbing over the safety gate to adjust a sensor (R. Exh. 33) on April 20, 2001; Barry Wernke was cited on November 10, 1999, for being inside the safety gates while the casting machine was running; notified of possible termination for future violations (R. Exh. 35); and Rod Penley was cited on March 12,1998, for not wearing his harness while on top of die cast machine, a second warning, issued a 2-day suspension (R. Exh. 36).

<sup>36).

169</sup> The record reflects that R. Exh. 81 was received into the record but, at this writing, I was not able to find it among the official copies of the Respondent's exhibits. I recall viewing this document at the hearing and would conclude that this record itself corresponded with the witness' testimony.

 $<sup>^{170}\ \</sup>mathrm{Hosford}$  stated that he has been employed by the Respondent for about 5 years.

<sup>&</sup>lt;sup>171</sup> Penley noted that actually Guthy, then in charge of the foundry, initially sent him over to shipping in February 2003. Eastep assumed responsibility of the foundry after Guthy was relieved of that particular duty.

Penley related other changes to his job. According to Penley, a few days after the maintenance techs were laid off, he was assigned by Eastep to do maintenance repair orders; for example, scraping metal from crucible bottoms, and cleaning and repairing spray guns. The crucible scraping was done daily and in the early part of the morning and took about 15–20 minutes and required completion of certain paperwork. According to Penley, Eastep assigned him the spray gun cleaning around the end of May 2003. Penley reckoned that spray gun cleaning required 3–4 hours per week of his time. Penley stated that if he were performing his old job, he would be devoting this time to changing the dross tub after scraping the furnace and dumping hoppers at the casting machines.

Another change related by Penley was his assignment to the final pack line where he filed parts in May and June 2003. Penley said he spent 2–3 hours per week there, about 1 to 1-1/2 hours in the morning after getting caught up in the shipping department.

Penley acknowledged that there were changes in the plant in May, including a decision to reduce one foundry worker on each shift and to run the foundry often with just one worker. Penley noted that when Tebo was laid off, Baker was left to work alone on first shift. According to Penley, Baker could not do the work and ultimately quit. Penley said that with the layoffs, he performed foundry duties until Tebo was recalled. <sup>173</sup>

When Tebo came back to work, Penley said that Tebo had to perform all the foundry work by himself. Penley said that he helped Tebo whenever he could but Eastep, on the second day of Tebo's return, instructed him not to assist Tebo.

When Tebo quit, Penley said he was put on a 12-hour shift to cover his duties; but his shipping duties were discontinued. Penley said that during this period, he ceased cleaning the spray guns; he had no time. Penley said the pace of production up until the time he quit in September was hectic, and he spent all of his time keeping the furnace clean and running the degas station, as the Company was then running all seven casting machines.

Penley denied ever telling Ortiz or Burns that he was willing to help out anywhere he could in the plant; he simply followed orders and did not volunteer for extra work. Penley acknowledged that he was given some help to keep the machines running, but generally only when he fell behind; otherwise, he worked alone to complete his assignments.

Penley recalled that in August 2003, both he and Tebo were working in the foundry on first shift. Penley stated his duties then included cleaning the furnace but also 2 to 3 hours operating the forklift in the shipping department. According to Penley, Tebo was delivering metal to the machines and degassing the furnace by himself at a fast and nonstop pace, and seemingly unable to stop to rest.

Directing himself to August 26, Penley said that he arrived at work to find Eastep running the degas station. Eastep informed him that Tebo had quit and that he (Penley) would have to take over the metal shuttle for the rest of the week as well as his regular duties. Penley said that at that point, his additional duties included basically what had been Tebo's job in addition to his own. Penley stated that the only help he received was at noon when he had to clean the furnace and when the machines ran out of metal.

According to Penley, the work was nonstop; seven machines were running all that week. Penley said that he found he could not keep up and never got to take his first and last breaks of the day, which he had been able to take before Tebo quit. Penley said he took no breaks because he felt he could not take a chance on leaving the machines without metal.

Penley said that he told Eastep several times that he was unable to get his breaks and Eastep informed him that Robert Potter was to relieve him. Penley said that Potter only relieved him when the machines were running out of metal due to his inability to keep up. Penley said that after this conversation with Eastep, he nonetheless missed all of his 10-minute breaks in the first and second week after Tebo quit.

According to Penley, work conditions were becoming unbearable, what with the temperature in the foundry over 100 degrees even in the morning. Penley said that he told Eastep that he could not continue working alone, that the pace of the job was causing him physical problems. According to Penley, Eastep told him that Ortiz had advised him that help was not forthcoming and that he (Penley) would have to make do. However, the next week (about the first week in September), Eastep did bring in Bownes from the second shift and told Penley to concentrate on helping Bownes to keep up with the metal sampling and furnace degassing and charging.

Penley said that Bownes, however, worked much slower than Tebo, so much so that he was not able to perform the duties of cleaning and charging the furnace that Eastep had assigned. Even with Bownes now in the foundry, Penley said that he could not take his 10-minute breaks because Eastep sent no relief workers. Penley said that he again spoke to Eastep about the workload and informed him that he could not continue working under these conditions. According to Penley, Eastep said that he was not going to get any additional help. However, Penley acknowledged that Eastep did offer to send Potter to help out, but Potter never showed up. Penley also noted that Potter was busy delivering metal to the machines.

On September 4, 2003, Penley said that he saw Maze, the human resources manager, walking through the plant around 10:30 a.m. and informed him that he would be quitting by 11 a.m., a decision Penley said that he had made at 10 a.m. Penley said that he decided to quit because he was getting no help in the foundry and he was basically physically breaking down because of the workload; he simply could not continue to work under the circumstances.

Penley said that Maze then consulted with Eastep who discussed the matter with him. Penley said he once more explained to Eastep that the pace and workload were the reasons he was quitting. Penley said that Eastep suggested that he take the rest of the day off to think over his decision. Penley said

<sup>&</sup>lt;sup>172</sup> Penley stated that Valer Pascanu used to perform the function but was promoted to maintenance engineer; in his view, just before the layoffs of the maintenance techs.

<sup>&</sup>lt;sup>173</sup> Penley said that after May 2003, he spent about 4 hours per day performing his normal foundry duties; prior to May 2003, he spent 6–8 hours per day in the foundry. He also said that for May and June, he was in the foundry 8 hours per day and did not work in final pack until his shipping duties were completed. (Tr. 412.)

that he told Eastep that nothing would change<sup>174</sup> and that taking off the rest of the day would be unavailing. Eastep acquiesced and Penley said that at around 11 a.m., Eastep helped him with the removal of his tools. Maze then came back to the area and produced a resignation form, which Penley said he signed and then left the plant. Penley noted that he told Eastep that he could not keep up with the job, but told Maze he simply could not do the job any longer.

Preston Eastep testified that he was aware of the complaint allegations charging that he changed Penley's job requirements because of his union activity and/or his having testified at a prior trial; and that the Union has essentially charged that he gave Penley additional tasks to induce him to quit. Eastep denied these charges.

Eastep stated that he is currently serving as a leadman but prior to this assignment he had been a working supervisor for 5 years 175 on the first shift in the foundry. Eastep knew "Bud" Tebo, Henry (Junior) Baker, and Randy Penley, each having worked for him in the foundry on first shift; on second and third shifts, respectively; Albert Bownes and Rick Hosford both worked in the foundry. Eastep noted that some temporary workers might have helped in the foundry off and on. Eastep said that he did not supervise Bownes or Hosford.

Eastep stated that in May and June 2003 on first shift, the Company was running fewer casting machines as compared to the period covering January through April of that year, and therefore there was less work in the foundry. <sup>176</sup> However, according to Eastep, the Company wanted to keep the workers busy and so Eastep acknowledged that he made extra assignments to take advantage of the lull to keep workers occupied.

Eastep stated that Penley's job basically was to clean furnaces at certain times to minimize downtimes on the casting machines because it was impossible to draw metal out of the furnace while it was being cleaned. Eastep believed that Tebo and Baker were taking advantage of this situation by having Penley do extra assignments to neglect the furnace so they would not have to "run metal." Eastep viewed the furnace cleaning part of Penley's job as one that could be performed in 4 hours of an 8-hour shift.

Eastep acknowledged that he asked Penley to assist in the final pack and shipping and receiving department, but not because of his prior Board testimony or his union activity, but because he believed Penley had previously operated a lift truck in that department, and, again, to keep him busy. Eastep also denied the charges that he gave Penley tasks to induce him to quit, and specifically denied ever telling Penley not to help Tebo.

Eastep noted that when Tebo and Baker were issued disciplinary suspensions in July, Rich Hosford and Albert Bownes were moved to the first shift. Penley was performing his regular duties at the time.

Eastep conceded that Penley was assigned a preventive maintenance job in May 2003. He explained that at the time molten metal was splashing from the crucibles under the furnaces, which prevented the casting machine from locking in place, causing downtime. So Ortiz and he decided that Penley had the time and was closest to the crucible holding stations where it was easiest to scrape the metal off. Eastep said that he also assigned Penley spray gun cleaning but, to Eastep, this was not preventive maintenance work like scraping crucibles, which only takes a few minutes to do as long as there was no appreciable buildup of metal; cleaning spray guns takes about one-half hour.

Eastep conceded that Ortiz decided to assign Penley to the shipping department in May 2003, operating the forklift. He noted also that Penley still was responsible for his assignments in foundry. He also acknowledged that cleaning the furnace was a priority for Penley, but that this duty took only about 4-1/2 hours of Penley's day. Eastep further acknowledged that he told Penley that Baker and Tebo were going to charge the furnace and that he would be doing other duties. Eastep also noted it was possible that when Tebo left, Penley could have been working alone in the foundry because there was about a 1-week break between Tebo's departure and Bownes being moved to first shift to help them out there.

Regarding breaks, Eastep stated that he tried to see that the workers received their breaks but that he expected them to advise him about problems taking breaks.

Eastep stated he was aware of the circumstances leading to Penley's leaving the Company. While not sure of the dates, Eastep said that he knew that Penley and certain other employees were scheduled for a random drug test. Then, the next day, he was advised around 10 a.m. by Maze that Penley was quitting, effective at 11 a.m. that same day. Eastep said he was caught by surprise and then Maze asked him to speak to Penley. Eastep said that he spoke to Penley in the foundry and Penley told him that he (Penley) felt that he had been stabbed in the back by having to take the test; that it was time for him to go. After Penley signed the resignation form provided by Maze, Eastep said that he helped Penley remove his big tool box. While helping with the tool box, Penley, according to Eastep, said that he did not think he was going to pass the drug test; he had slipped or fallen back, and that was why he was quitting.

Bownes testified that during the first half of 2003, he was a lead foundry tech on second shift, not a foundry maintenance tech. While he worked by himself on his shift, Bownes stated that there were three foundry employees working on the first shift. On his shift, Bownes stated that he handled "everything" in the foundry except cleaning the spray guns, the furnaces, and

<sup>&</sup>lt;sup>174</sup> Penley stated that Bownes, whom he was supposed to be assisting, was so slow that he created more work for him (Penley) and that this also was a factor in his decision to quit.

 $<sup>^{175}</sup>$  Eastep assumed his leadman duties in about May 2004. The Respondent admits that at the relevant times, he was a supervisor within the meaning of the Act.

<sup>&</sup>lt;sup>176</sup> Eastep identified R. Exh. 101, a monthly summary by shift of total hours of production for all machines at Intermet for the calendar year 2003. I note that this summary reflects that from April 2003 through July, the first shift total number of hours of production was in a steady decline as compared to the prior 3 months. Production hours for the first shift increased markedly for the balance of that year.

dross tubs.<sup>177</sup> Bownes said that he worked 12-hour shifts in the first half of 2003 and since. Bownes confirmed that he moved to the first shift after Tebo quit and noted that Penley was cleaning and changing furnaces, cleaning spray guns, and relieving other workers for breaks; Penley also helped out in shipping and in the final pack department. Bownes felt that Penley's job was no harder than anyone else's job in the foundry. As far as he was concerned, Bownes said that Penley always took his breaks when he felt like it and Penley relieved him (Bownes) on occasion for breaks.

Bownes stated that after Tebo quit (in August), Penley, Robert Potter, and he worked the first shift in the foundry. According to Bownes, he worked an 8-hour shift except when someone went on vacation, which then necessitated his working a 12-hour shift. Bownes confirmed that at the time the pace was hard and hectic for everyone and he himself needed help; and without Potter's assistance on first shift, he could not have kept up with his duties which included degassing, crucible scraping, metal analysis, and charging of the furnace duties. Bownes stated that in addition to Potter, Eastep himself relieved employees so they could get their breaks.

Richard Hosford, currently employed at the Intermet facility for about 5 years, testified that during the first half of 2003, he was the sole lead foundry tech working on the third shift; there were no other foundry maintenance techs on the third shift. The Hosford stated that his duties have included charging the furnace, conducting metal analysis checks, scraping metal off crucible bottoms, cleaning tools, and changing and cleaning dross tubs. Hosford said that he has worked 12-hour shifts and has run as many as five casting machines when he was the only one on his shift. He conceded that with five machines running, the pace is nonstop, one is working all the time; the pace is just as hectic with six machines running. Hosford said that he would not work alone with seven machines operating. Hosford opined that an employee actually had all that he could handle with four machines running.

Robert Potter<sup>180</sup> testified that from about January through September 2003, he was employed as an engineering tech working the first shift at the Intermet plant. Potter stated that during this time, he assisted Tebo, Baker, and Penley with job assignments in the foundry and provided each man opportunities to take lunch and other periodic breaks. Potter conceded that it is possible that an employee could miss his breaks—he

missed his own breaks—but that it is not true that any of the workers received no breaks during this period.

Potter noted that after Tebo and Baker quit, he worked full-time—8 hours in the foundry for 2–3 weeks until replacements were found. Potter stated that Penley worked in the foundry at that time but was working no harder than anyone else. <sup>181</sup> Potter said that he has worked 12-hour shifts and assisted other departments, including final pack, tool room, and maintenance.

Potter stated that in point of fact, it was a common practice during his time with the Company for employees to help out in the different departments.

Maze testified that the foundry maintenance tech position included certain duties in the foundry, but also included assisting with the material handling technician role as needed and performing other duties as assigned in the ultimate support of manufacturing and the company goals. Maze noted that as part of the foundry maintenance job, Penley was also required to be able to operate a powered lift truck and he indeed had a valid operator's license. Real Page 183

Maze stated that on about August 29, 2003, he conducted a power point presentation covering the Company's drug testing and employee assistance programs among all employees on all shifts. <sup>184</sup> Maze noted that he decided to give this presentation for several reasons, mainly because he was newly hired; an employee had tested positive recently for drug use; and the onthe-job injury rate was going up. <sup>185</sup> Maze said that he also decided that a random drug test was warranted at that time. Accordingly, Maze set up an unannounced drug testing for three employees—Jeff Puibyl, Tony Ricketts, and Penley. Maze denied that any of the three, most particularly Penley, was selected because of his union activity or testimony at the prior hearing.

Maze said that he had several conversations with Penley regarding the drug testing he was to undergo. Maze spoke to Penley to set up the appointment and actually took him to the testing center. According to Maze, Penley said in one of the conversations that he had been taking his girlfriend's prescrip-

<sup>&</sup>lt;sup>177</sup> Bownes said that his duties included helping in shipping, weighing T-bars, charging the furnace, cleaning his tools, and performing metal analysis checks in the laboratory.

<sup>&</sup>lt;sup>178</sup> Hema Guthy also stated that he observed Penley working in the plant during the period covering May through September 2003 and did not think that his duties were more demanding than the other workers. (Tr. 1733.)

<sup>&</sup>lt;sup>179</sup> Richard Hosford noted that the Company has used temporary workers on third shift but could not recall the dates. He said that during the first half of 2003, there may have been temporary workers on the third shift

<sup>&</sup>lt;sup>180</sup> Potter stated that he is a current employee of the Respondent and has worked for the Company for about 10 years; he presently occupies an engineering tech position.

<sup>&</sup>lt;sup>181</sup> Marcia Loomis, currently a process monitor working in the lab, stated that she observed Penley (and Tebo and Baker) working in the foundry during the first half of 2003, and, in her view, their duties were not any more strenuous or burdensome than other hourly workers. (Tr. 1878)

<sup>1878.)

182</sup> Maze identified R. Exh. 15, the job classification description for the foundry maintenance tech position as of July 7, 2002, in the material handling department (including the foundry), which set forth the skill related duties and responsibilities of that job.

<sup>&</sup>lt;sup>183</sup> Maze identified R. Exh. 16, the job classification description for the material handling technician which specifically required the ability to operate powered lift trucks; Penley's previously-noted forklift operator license (R. Exh. 17) with an expiration date of November 7, 2003, as well as copies of Penley's power lift written examination and driving test, both of which he passed on November 13, 1999.

<sup>&</sup>lt;sup>184</sup> Maze identified R. Exh. 64 as copies of the presentation that evidently was delivered on slides. Maze said that Penley attended one of the meetings.

<sup>&</sup>lt;sup>185</sup> Maze identified logs of work-related injuries and illnesses made and kept by the Company pursuant to OSHA regulations for calendar years 2002 and 2003. The forms indicate 3 work-related injuries in 2002 and 14 in 2003.

tion medicine (ambien) for a sleeping problem. Also on the day he quit, Penley said that he felt the Company had treated him bad in making him take the drug test. Maze said he told Penley that the testing was only being done to ensure a safe workplace for everyone; that the Company could not have employees operating under the influence. Maze said he also told Penley that he was not the only employee being tested. Maze said that he asked Penley if he were really sure of the test results which had not yet come back from the testing center, to wait and see if he failed or passed. According to Maze, Penley responded that he was taking the ambien and had been smoking "pot"; Penley said he was quitting. Maze asked Penley to sign a voluntary resignation form and he did so on September 4, 2003. 186 According to Maze, Penley's drug test came back negative.

### D. The 8(a)(3) Allegations Relating to Foundry Technicians Sylvester Tebo and Henry Baker

The complaint essentially alleges in paragraph 9(j)(1) that around May 28, 2003, Eastep changed Tebo and Baker's job requirements by assigning them additional duties; and in paragraph 9(k), Eastep and Guthy are alleged on or about May 30, 2003, to have changed Tebo and Baker's job requirements. In paragraph 9(l), Supervisors Valerie, Ortiz, Guthy, and Maze allegedly suspended Tebo and Baker on June 16, 2003. Paragraph 9(m) alleges that Ortiz and Maze laid off Tebo on June 16, 2003. Paragraph 9(n) essentially alleges that Eastep assigned duties previously performed by Tebo, Baker, and Penley to Baker alone on June 24, 2003. Paragraph 9(o) charges that Eastep assigned duties performed by Tebo, Baker, and Penley to Tebo alone on July 14, 2003.

In paragraphs 9(p) and (q), the complaint alleges that the Respondent's conduct in the aforestated paragraphs caused the termination of Baker on June 24, 2003, and Tebo on August 26, 2003, respectively. The Respondent is charged with violations of Section 8(a)(3) and (1) of the Act with respect to the aforementioned allegations.

Tebo and Baker were called by the General Counsel to testify about occurrences at the plant during the relevant time frame.

#### 1. Sylvester Tebo's version of pertinent events

Tebo stated that he had worked for the Respondent since about July 1990; his last date of employment was August 26, 2003; his last job was lead foundry tech, a position he held for about 2 years before his departure.

Tebo stated that he was aware of the union organizing drive in February 2002, and supported the Union by signing the representation petition, wearing union hats at work after the Board hearing, attending union meetings, and generally giving "moral" support to the employees. Tebo said that he wore

his UAW hat around the foundry and the plant until the day he quit working at Intermet.

Tebo related the circumstances surrounding and leading up to his decision to terminate his employment with the Respondent

Tebo stated that at around the time of the initial layoffs of the maintenance techs (May 2003), there were three employees working the shift in the foundry—Penley, Henry (Junior) Baker, and himself. According to Tebo, at the time there were five to seven machines running, and the division of labor between the three was Penley handling furnaces duties; Baker ran the degas operation, and Tebo, as he said, "ran metal;" together the first shift produced or "burned" 25–30 crucibles per day.

Tebo described his usual and customary job duties as a lead foundry tech. According to Tebo, "running metal," his primary duty, entailed transporting molten metal from the foundry in 1500-pound crucibles to the casting machines. He exchanged the full crucibles for empty ones which he took back to the foundry. Once there, he refilled the empties with molten metal from the furnaces, added precise measurements of other elements according to the daily posted instructions of the metallurgist, and then transferred the crucible to the degas station where, in a 6-minute process, hydrogen is removed from the metal. At this point, Junior Baker at the degas would then take (pull) samples from the crucible, mark them by crucible number, date them, and then take them to the quality lab to be tested for concentration, density, and cleanliness or purity. After the metal is approved, either he or Baker would move the crucible to a holding station prior to casting. This process was repeated throughout the shift so, by way of example, if there were five casting machines running, there would be five rotations per machine per day or 25 crucibles of metal processed for casting parts.

Tebo said that he was also responsible for filling out certain paperwork associated with the process, including a push/pull log, crucible approval sheets, and a degas processing sheet although the degas tech (Baker) and the quality control (process monitor) also had a role in completing some of this paperwork.

Tebo said the approval sheets, for instance, traveled with the crucibles and were posted along the shuttle route the crucible traveled. Tebo noted that unchecked boxes on these sheets required that the sheet be returned to the laboratory for verification and then returned to the foundry. According to Tebo, prior to May 2003, he caught quite a few of these lapses in checkoff procedure. <sup>188</sup>

Tebo noted that prior to May 2003, Penley took care of the furnaces-charging and cleaning the wells and inside of the furnaces and that even when they were running as many as five,

<sup>&</sup>lt;sup>186</sup> Maze identified R. Exh. 66 as a copy of the September 4, 2003 resignation form signed by Penley and himself and witnessed by Eastep.

<sup>&</sup>lt;sup>187</sup> Tebo identified his signature on the representation petition. I also note that Tebo was the subject of alleged unlawful attempt to secure his vote by the Respondent in the Intermet I case, and testified at the prior

Board hearing. Judge Miserendino did not find a violation regarding this allegation.

<sup>&</sup>lt;sup>188</sup> Tebo noted that Marsha Loomis, a process monitor in the lab, neglected to check off forms for a couple of days. Tebo said he took the forms to Guthy to verify that she was at work because of these lapses in the past.

<sup>189</sup> Tebo explained that Penley charged the furnace as his regular duty around four times per day; this duty required use of a forklift. Tebo noted that prior to May 30, 2003, he had also charged the furnace and estimated between July 2001 and May 30, 2003, he charged the

and even seven machines, he (and Penley and Baker) could keep the machines running even in this hectic work environment and were able to avoid bunching them up and having downtime. Tebo stated that prior to May 2003, he missed his breaks (taken at 9:30 a.m., lunch at 12 noon, and 2 p.m.) due to work-related problems but did not complain to management because he felt that as the lead tech, he was obliged to keep the operation running. Tebo estimated that prior to May 2003, he may have missed his lunchbreak quite a few times and he was sure more than once per week.

Tebo directed himself to May 24, 2003, when he and Baker were informed by Eastep that they were to commence charging the furnace because Penley was going to be assigned additional duties. According to Tebo, Eastep said that Penley was going to assume the job of scraping crucible bottoms and cleaning the spray guns.

Therefore, Tebo would have to charge the furnace, a process that entailed obtaining the metal ingots with the (shielded) fork-lift, completing the necessary paperwork for the metal (documenting the metal so loaded) and loading the actual metal into the furnaces. Tebo stated that the new charging assignment presented problems for him in the performance of his job. One, Penley at this time was sent over to shipping and took the shielded forklift, the only one that could be used to load metal in the furnaces; two, now having to check that the furnace was at the proper temperature and loaded with sufficient metal, Tebo had to leave the casting machines. <sup>190</sup> According to Tebo, charging the furnace took about 20 or more minutes.

Tebo said that he and Baker soon worked out a procedure to handle the charging duty along with their regular duties. However, the pace was hectic, especially when more than four casting machines were running.

Around May 30, Tebo said that he was notified by his supervisor, Eastep, that Junior Baker and he were to attend sessions with the metallurgist, Guthy, to be trained to test metal. Eastep, according to Tebo, said that they would be assuming these duties because Marsha Loomis, the quality lab process monitor, would not have time to perform metal testing, her normal duty.

Tebo stated that he and Baker met with Guthy and received training on the spectrometer and the RPT and K-mold testing procedures; the training took about 15 minutes.<sup>191</sup>

Tebo said that after receiving Guthy's instruction, he went back to the foundry to check on his crucibles, whereupon Eastep asked him how he planned to handle the additional duties. Tebo said that he told Eastep he would manage somehow.

furnace 20 to 30 times or more. Between August 2002 and May 30, 2003, he estimated he charged the furnace about 15 to 20 times, but only when Penley was busy did he help him out. Notably, R. Exhs. 1(a)–(p) indicates that Tebo charged the furnace about 111 times during the period covering October 5, 2002, through March 7, 2003. These entries were made on the furnace charge log. On some of these days, Tebo was working overtime or filling in for Penley.

<sup>190</sup> Tebo noted that if the furnace heat was too low and undersupplied, the casting machines would shut down.

<sup>191</sup> Tebo stated he was aware, even after this training, that Baker would have trouble operating the spectrometer, which is computer-assisted

Tebo said the testing duties were to commence the following Monday, June 2, and that he and Baker worked out a procedure to handle their regular and now additional duties. <sup>192</sup>

Tebo noted that his new duty required the completion of additional paperwork—logsheets for the readings, a book to record the results of testing on the samples, and completion of the crucible forms. According to Tebo, it took 10–15 minutes to complete these tests. Tebo said that Baker and he commenced their new duties but found themselves falling behind. Tebo said that he spoke to Eastep about the problem. Eastep advised them to concentrate on the priority machines running production as opposed to two other machines which were running trial castings.

Tebo said things went smoothly for a while, but again Baker and he were falling behind, mainly because Baker was having trouble charging the furnaces. Tebo said that he took over the charging and told Baker to operate the computers for the sample testing. Tebo related that he and Baker managed to get through that first day but he told Guthy that Baker needed additional training on the computer because he (Baker) had confessed that he was not very good with them. Moreover, Tebo said he told Guthy that he could not answer Baker's technical questions about the computers. Nonetheless, Tebo and Baker worked the week with this plan as altered in place.

Tebo related an incident in the foundry occurring on June 5, 2003, which happened to be a day of a visit to the plant by representatives of a major automobile manufacture; this incident led to his suspension.

Tebo explained that on June 5, there were five casting machines in operation on his shift and a sixth machine running sample parts. He recalled that the operator for one of the machines informed him of a fairly immediate need for metal. Tebo began preparing a crucible for this machine. Then, according to Tebo, Patterson interrupted him and asked if he could "change out" machine #2 to demonstrate to the visiting representatives how a crucible is taken out of service. Tebo said that he told Patterson the other machine needed metal soon and he would attend to the demonstration afterwards. However, before he could act, the auto representatives appeared on the floor. Tebo said that he had just loaded crucible #5 on the shuttle so he decided to load this crucible into machine #2 as Patterson had requested. This would entail removing the threefourths full crucible already on the machine, and thereby demonstrate the "change out" capability of the Company's machinery to the visiting representatives. 193 Tebo said he transferred the three-fourths full crucible back to the foundry and picked up another rather full crucible for the machine that he had been

<sup>&</sup>lt;sup>192</sup> According to Tebo, their initial procedure entailed Tebo's running the metal shuttle and operating the spectrometer and performing the computer tests because Baker was proving to be very slow on the computers. Baker would continue with his degas duty and charging the furnace. (Tr. 178.)

<sup>&</sup>lt;sup>193</sup> While not explained in any further detail, the change out capability seemed to be an important selling point, or so I would gather.

told was running out of metal. Tebo said he managed to resupply this machine just as it was casting its last "shot" of parts. 194

However, later that morning around 10 a.m., Tebo said that Eastep produced a crucible approval sheet for crucible #5 that did not have the chemistry box checked off and Tebo realized that it indeed had not been checked. Tebo said he told Eastep he would speak to Baker about the matter. Later, Tebo said that he spoke with Baker and determined from him that the metal for the crucible was good but also advised Baker to be more attentive to the paperwork. <sup>195</sup>

Tebo said that he also checked Baker's log book and determined that Baker had approved crucible #5 across the board, so on this basis also he felt the metal was good in all respects. <sup>196</sup> Tebo said he then checked off the chemistry box for the crucible and returned the approval sheet to the aforementioned machine #2 where the crucible was to be processed.

Tebo said that he spoke to the machine operator, Dale Potter, and advised him that Baker had simply forgotten to check the box but the log sheet showed that the metal was good. Moreover, he stated to Potter that Baker had told him that there had been no bad metal all morning with one exception—crucible #9. Tebo said that out of caution, he, nonetheless, checked the other machines for possible errors in their approval sheets. Tebo said that he found other unchecked boxes and, after consulting the log sheet, approved these crucibles also.

Later that same day (around 3 to 3:15 p.m.), Tebo said that Baker and he were called to a meeting with Eastep and Ortiz in her office. Brandon Reed was there also. According to Tebo, Ortiz inquired about crucible #5 and he explained that Baker had forgotten to check off the chemistry box. Baker confirmed that he had made this mistake. Ortiz asked about the loss of metal traceability, to which Tebo responded that there was no loss because he had consulted the log book. Ortiz also asked him what would happen if traceability was lost, and Tebo explained that the parts are put on hold or quarantined. The meeting ended after these discussions, and Tebo and Baker continued working.

However, on June 16, 2003 (around 2:50 p.m.), Tebo stated that he was called to a meeting with Maze, Ortiz, and Guthy and advised that he was to be issued a formal written warning and a 5-day suspension.<sup>197</sup>

According to Tebo, he was told in the meeting that metal traceability was lost on crucible #5, and Ortiz said that there were two crucibles identified as #7. Tebo said he denied that

<sup>194</sup> Tebo said that the operator of the machine had advised him that he only had five "shots" worth of metal in his machine when Patterson made the change out request.

there was any loss of metal traceability with respect to crucible #5 and had no knowledge of any problems with crucible #7, for which he was shown no paperwork by management. Tebo also noted that these infractions were not brought to his attention during the period between June 5 and 16, during which period he continued to run quality tests. Tebo stated that he actually did not come to a full understanding of the reasons behind his suspension until he discussed the matter with the General Counsel in preparation for the instant hearing. <sup>198</sup>

However, at the hearing, Tebo was shown the chemical analysis sheets purporting both to be for crucible #7 and stated that in his view, it was readily determinable that there were different crucibles involved, especially since the readings were different.

Tebo stated that if one were to examine the June 5 metal analysis log (GC Exh. 36), it would show that crucible #5 was approved at 8:40 a.m., and the computer printout showing a crucible (#7) being approved at 8:49 a.m. (G. C. Exh. 40) actually referred to crucible #5. Thus, the test-run document (GC Exh. 38) showing two test runs for crucible #7 at 8:25 a.m. was a clear mistake.

In short, according to Tebo, one of the test runs attributed to crucible #7 should and would have been associated with crucible #5 and on this basis, there would be no loss of metal traceability. Tebo also noted that metal traceability could also be determined through a retest of the sample puck used for chemical testing. All in all, Tebo believed that Baker probably forgot to change the crucible number and crucible 7 was counted twice when, in reality, there were two different crucibles involved. In his view, this mistake did not cause loss of metal traceability.

Tebo did not return to work from suspension as scheduled on June 24, opting instead to take a voluntary layoff. Tebo explained that Maze informed him on June 16 that the Company would be laying off workers and that some salaried as well as hourly workers had been laid off. According to Tebo, Maze offered him a job in the final pack department with an 83-cent

<sup>&</sup>lt;sup>195</sup> Tebo identified GC Exh. 35, a crucible approval sheet for crucible #5 dated June 5, 2003, as a copy of the pertinent document but with all the boxes checked.

 $<sup>^{196}</sup>$  Tebo identified GC Exh. 36, the metal analysis log for June 5, 2003, as the log he consulted. This document indicates that crucible #5 was approved at 8:40 a.m. on June 5.

<sup>&</sup>lt;sup>197</sup> Tebo identified GC Exh. 37 as a copy of the official warning and suspension notice. The notice, inter alia, cited Tebo's failure to follow procedures that ensure full metal traceability and forcing parts to be quarantined, resulting in increased labor and production costs. His suspension was without pay and would cover June 17–23, 2003.

<sup>&</sup>lt;sup>198</sup> The General Counsel showed Tebo a computer run of spectrometer testing done on June 5, which was obtained from documents subpoenaed from the Respondent for this case. The document showed that on June 5, crucible #7 appears as having been tested twice at 8:25 a.m. The operator is listed as "Jr.," short for Henry (Junior) Baker. See GC Exh. 37. Tebo said that he saw this document for the first time when he was being interviewed by the General Counsel for the hearing. Tebo said that he did not check the spectrometer computer records on June 5. He had no time to do this and, furthermore, it was not his job to monitor the spectrometer reports. He noted that the metal analysis log he consulted on June 5 (GC Exh. 36) indicated that crucible #7 was tested and approved only once at 8:25 a.m. Tebo, shown GC Exh. 3, a chemical analysis sheet for crucible #7 indicating that it was tested at 8:25 a.m. on June 5, said he had not seen this before the hearing.

<sup>&</sup>lt;sup>199</sup> Tebo demonstrated his point by noting that the density results of a purported density test on crucible #7 at 8:25 a.m. was "2610." The crucible approval sheet for #5 at 8:43 a.m. indicates a density reading of "2627," which is identical to the density result noted on the metal analysis log of June 5. The computer document showing two tests of crucible #7 at the same time, 8:25 a.m., was an obvious mistake and by going back through the document, the error would have been cleared up.

cut in pay or the option of a voluntary layoff. Tebo asked whether unemployment benefits would be available to him if he chose the layoff. Maze indicated they would and gave him until 3 p.m. the next day to decide. Tebo stated he was advised that the layoffs would be accomplished by seniority, by shift, and that on that basis, Baker had more seniority in the foundry. Tebo said he opted to take the voluntary layoff.

Tebo stated that he was called back to work by the Company on July 14, having been informed that the layoffs were significantly shorter than anticipated. However, when he got back to work on the first shift, he discovered he was the sole employee in the foundry. Baker had quit. Tebo said that at the time, the Company was running four machines. However, according to Tebo, his duties no longer required testing crucible samples as Loomis was now working back in the lab. Tebo's duties, prior to his suspension and layoff, otherwise remained the same.

Within a week of his return, Tebo said the Company added a fifth machine which increased the pace from "tight" to a lot more hectic. Tebo said he asked Eastep for more help, mainly from Potter who Eastep had said would be available for backup. Eastep's response, according to Tebo, was not to provide help but to question him as to why he was falling behind. Tebo said he then discerned the Company's objective. Tebo said he repeatedly called for help during the days additional machines would be operating. Penley at the time was assigned to shipping and working on the spray guns, but occasionally helped with the degas.

Tebo said that as of his second day back, he had trouble taking his breaks. Eastep asked him to squeeze his breaks in between rotations of the crucibles; however, this was not possible because there was no end to the rotations, the operators were always calling for more metal. After a time, Tebo said he eventually just gave up asking for breaks.<sup>201</sup>

Tebo stated that during the time he was working around 48 hours per week alone in the foundry. Tebo said that towards the end of August 2003, he got fed up with the way he was being worked and he quit. He explained what happened.

According to Tebo, on August 25—a Sunday night—he was called at home and told to report to the plant at around 3 a.m. because Hosford was unable to come in. This would mean that Tebo would have to work a 12-hour shift.

Tebo said that when he arrived, Bownes was finishing up on his rotation and left the plant at 3:30 a.m. At the time, five machines were running. Then Potter instructed him to prepare for the running of two additional machines for the first shift at 5 a.m. Tebo started preparing the two machines but found himself falling behind and sought help and eventually received the assistance of another employee around 4:30–4:45 a.m. However, in spite of this assistance, a number of problems arose with the machines, including the loss of a heating element requiring a crucible to be placed on hold. According to Tebo,

crucibles started stacking up so that eventually three of the seven machines went down because the metal had not been approved.

The morning then was turning progressively worse when, according to Tebo, Eastep asked to see his downtime by shift paperwork. Tebo said that he told Eastep a machine needing metal was going down; he was awaiting approval sheets; and that the downtime sheet was in his toolbox. Eastep then asked why he could not keep up with the downtime log sheet. Tebo said that he explained that he had the furnace to charge, crucibles to move, and machines going down. According to Tebo, Eastep continued to say "make me understand why [he] could not keep the log sheet caught up." (Tr. 214.)

Tebo said at that point, he got angry and smart with Eastep and told him that talking to him was like talking to a stack of castings. Tebo said that he was trying to say that he was falling behind because he had no help. Tebo said that in spite of this, he continued to work and load crucibles and Eastep started to say something else to him, and he (Tebo) just "blew up," said that he had enough and quit, and walked away saying that there was no cause (for the way he was being treated).

Tebo said that he quit because he could not do the job alone and his pride in not having downtime was wounded and was embarrassing to him.<sup>203</sup> Tebo noted that he had run seven machines before but with proper help; that he and Baker on other days had worked together a full 8 hours running seven machines, 35 crucibles, with no downtime.

### 2. Baker's version of the events leading to his resignation

Baker, known as "Junior" around the plant, testified that he worked for the Respondent from 1975 until about June 24, 2005, when he quit. Baker said that he worked on the final pack line and other departments for a number of years but at the time of his departure, he had been working in the foundry for about a year. Baker said that over his 27 years with the Company, he worked in some capacity with the smelting furnaces.

Baker recalled the union organizing drive in around April 2002 and said he was active in the effort. He attended meetings and signed the representation petition. Baker said that he testified in the Intermet I trial in September 2002 and his having signed the representation petition was part of his testimony. According to Baker, management representatives were in attendance at the trial when he testified. Baker noted that even after the election, he continued in his open support of the Union by wearing union hats in the shop and attending union meetings.

Baker related that when the Company converted to the new PCP casting machine process, he was offered a job in the foundry by a woman in human resources whose name he could not recall. Baker said he did not accept the job because the new

<sup>&</sup>lt;sup>200</sup> Tebo's tone of voice at the trial gave me the impression that he felt that the objective of the Company was to get rid of him.

<sup>&</sup>lt;sup>201</sup> Tebo admitted that he was able to get his lunchbreaks, especially after July 14 when the Company implemented the swipe in/out procedure. However, he related that Eastep, around August 22, became irritated with him when he sought breaks.

<sup>&</sup>lt;sup>202</sup> Tebo said the previous procedure was to note downtime at the end of the shift. The new procedure required noting this presumably closer to the real time incidence of downtime.

<sup>&</sup>lt;sup>203</sup> Tebo recalled that Barry told him 2 years ago that nothing takes priority over the (movement of) a metal. Metal cannot stop for any reason. Tebo said he was the proudest guy in the shop because he had "zero" downtime and told Barry as much.

<sup>&</sup>lt;sup>204</sup> Baker identified his signature on the petition. See GC Exh. 2(d).

position entailed doing paperwork that he felt he could not handle because of his spelling deficiencies. However, he wound up in the foundry anyway because some employees there had quit and Zoe Burns asked him to help out until replacements could be hired. Baker said he told Burns that he would be glad to help out but did not want a permanent assignment; he was quite willing to fill in any time. So Baker said that he worked in the foundry off and on for a year, up to the election. When the Company later hired a foundry worker and he went back to final pack. However, according to Baker, the replacement evidently could not do the job, and Guthy asked him to come back to the foundry. Baker informed Guthy that he would help out but still did not want the job permanently; and, as far as he was concerned, he never officially transferred to the foundry.

Baker confirmed that prior to May 2003, the three employees working in the foundry were Tebo, Penley, and himself. He conceded that prior to May 2003, he was called upon to fill crucibles, degas the metal, and skim dross<sup>205</sup> from the molten metal. Baker stated that he also took samples from the crucibles, ladling them into molds to cool, marking them by date and crucible number and then taking them to the lab for approval. Crucible approval sheets were kept on a clipboard in the foundry and filled out by the foundry tech. Baker said that as soon as a crucible was brought in for degassing, his job was to put the crucible number on the form. He then wrote in the RPT number after he took the vacuum pressure readings and recorded these. Then he took the samples to the lab where the RPT density tests and the computerized spectrometer tests were run by a lab worker. A crucible would be released or rejected by the lab worker who would initial the date and time of her action. This crucible approval sheet would then be returned to the foundry. 206 Baker said he would then return to the degas station and start the process over for the next crucible, a process he said was repeated as many as 30 times per day.

According to Baker, Penley was still cleaning and filling the furnaces as of May 30, 2003, when there were around five to seven machines running daily. According to Baker, when they were running six machines, it was a very, very busy day. He noted that prior to May 2003, he missed his breaks quite often; he was too busy to take breaks and there was no one to relieve him.

Baker stated that in May 2003, his responsibilities were changed by management to include doing his own crucible sampling and approvals and running the spectrometer tests.

Baker confirmed that Guthy trained Tebo and him for about 10–15 minutes on doing samples and running the computerized testing operations. Baker said that he was pretty nervous about the computers because he had never even touched a computer before and knew nothing about them and told Guthy as much. Nonetheless, according to Baker, Guthy persisted and tried to

show him how to use the mouse in particular. Baker confessed that he was getting confused and simply could not work the computer and did not learn how to operate it on that Friday at around 3 p.m.<sup>207</sup> Baker said his new duties were to commence the following Monday.

According to Baker, Guthy told Tebo and him that they had to perform these duties because other workers were too busy and had no time to do samples. Baker said that Tebo and he were never given any training materials for the machines; they were just shown how to operate the computer and the RPT test by Guthy.

Baker said his new duties required him to do additional paperwork, mainly the metal analysis log sheet, checking off the appropriate boxes on the crucible approval sheet, and signing and dating it.

Baker said that in spite of the training (or the attempt) he was given, he continued to perform his job in his accustomed way. However, Tebo tried to perform the job as Guthy had instructed. After a time, Baker saw that the job was too much for Tebo and so he told Tebo that he would give the additional work a try. Baker said he tried to do the sampling testing but found himself having to call Marsha Loomis (in the lab) constantly for help. He felt initially that it was too much for him, but after 3–4 days, Baker said that he finally was able to do the sampling testing unassisted.

Baker related another change in his duties that occurred in perhaps late May or early June 2003. Baker said that at that time, Tebo, who was the lead foundry tech, told him that Ortiz had informed him that he and Tebo would have to assume charging the furnaces because Penley was going to be assigned other jobs and would not be available to do this as he had previously.

Baker noted that on first shift the furnace had to be charged six to eight times per day; each charge took 7–8 minutes to do. Baker explained that charging entails dumping two to three hoppers with scrap and T-bars into the furnace and completing paperwork indicating the weight, temperature, and time of the bars when dumped; all such paperwork was kept on the foundry forklift. Baker stated that keeping the furnace charged was very important for if the metal content was too low, the pumps could not function to remove the molten metal; the furnace had to be kept up to level.

Baker acknowledged that he had charged the furnaces before, but never was this part of his regular duties. However, the addition of this function in June 2003 caused him to fall behind on his work with the crucibles. Baker said at this time the pace of the first shift was busy.

<sup>&</sup>lt;sup>205</sup> Dross is a sludge-like substance that comes to the surface as a by-product of the degassing process.

<sup>&</sup>lt;sup>206</sup> Baker acknowledged that he knew that an employee should never check off a box on the crucible approval sheet for another employee, and never check off the chemistry box on an approval sheet unless based on spectrometer readings. (Tr. 319.)

<sup>&</sup>lt;sup>207</sup> Baker could not recall the exact date he received his additional duties, only that it was a Friday in May 2003.

<sup>&</sup>lt;sup>208</sup> Baker explained that he generally only charged the furnace when Penley was not available; that between January 2002 and May 2003, charging was Penley's job. Baker, when shown a furnace charge log for the period covering January 15 through May 23, 2003 (R. Exhs. 2(a)–(p), agreed that on these dates he assisted Penley with the charging duties because he was free and Penley was probably busy. Baker also acknowledged to the Respondent's counsel on cross-examination that at some point in 2002, he told Burns that he would be happy to help out in any way around the plant.

Baker admitted that on June 5, 2003, he made a mistake—failing to check the chemistry—with the crucible paperwork and that it happened on the day an auto manufacturer's representatives were visiting the plant. Baker said that Tebo told him that the midnight shift supervisor, Bill Potter, caught the mistake. Baker insisted that he had indeed run the chemistry test<sup>209</sup> but had forgotten to check off the box on the approval sheet in question. Baker identified the metal analysis logsheet for June 5, 2003 (GC Exh. 36), that he initialed stating that no metal was rejected that morning and all boxes on the log were checked or accepted. He said this tells him he approved all the metal chemical tests, including the one for which he did not check the chemistry box on the approval form.

Baker said he was disciplined for his mistake. Baker explained that he was called into a meeting with Valerie Ortiz, Guthy, and "Randy"<sup>210</sup> (he believed) whereat Ortiz apprised him of the mistakes that he had made—failing to mark the approval sheets, mixing up the crucibles, and not approving the metal which had to be redone. Baker could not recall being shown any paperwork supporting the claimed mistakes, but was given a formal written warning that day and issued a 5-day suspension<sup>211</sup> effective June 17; he was expected to return to work on June 24.

Baker noted that between June 5 and 16, he continued to run the lab tests but he was more careful with the paperwork. Although he was given no additional training on the testing procedures during this period, he began to catch his own mistakes after a time

Baker said that a few days after he was suspended, he discussed the matter with Tebo at the union hall. Tebo said that he was laid off or going to be laid off and that Baker would be working in the foundry by himself when he returned to work. Baker said that he returned to work on June 24, and spoke to Eastep, who confirmed that Tebo was no longer working and that he (Baker) would have to work the first shift by himself. Baker said that he told Eastep that he could not do the job by himself, that Tebo always handled the many problems (including maintenance matters) in the foundry—things that he had never done. According to Baker, Eastep advised that he would be responsible for delivering crucibles to the machines;

cleaning, filling, and degassing the furnace, and drawing all the samples and taking them to the lab by himself. Baker said that Eastep felt he could do the job.<sup>213</sup>

Baker said that he did not actually work on July 26, but instead, fed up, simply quit, and left the plant. Baker acknowledged that the conversation with Eastep ultimately persuaded him to quit, but he actually had made up his mind to quit based on his conversation with Tebo.

Eastep testified that as with Penley, he was aware that the Union had charged that he changed the job requirements of both Tebo and Baker because of their union activities; he denied any connection of their union support to any changes in their duties.

Eastep asserted that Tebo and Baker were given metal sampling duties because at the time the Company was running just five machines and he wanted to keep them busy; otherwise, they would have had a lot of time on their hands.

Eastep also presented his version of the events that took place on June 5. Eastep said that he was told by Dale Potter that the paperwork for one of the crucibles was not filled out properly on a day that the Intermet was visited by a potential new customer—a major automobile manufacturer—the Company was courting.

Eastep said he determined that Tebo was responsible for the paperwork in question and confronted him about the violation of procedure and policy, especially at a time when there were visitors at the plant. According to Eastep, confronting Tebo, he warned him that "we" could get in trouble for this failure. To Eastep's surprise, Tebo marked the approval sheet right there and then in front of him (Eastep) without knowing whether the metal was good. Eastep said the proper action for Tebo to have taken in such a case would be to go to the lab and determine if the metal had been approved through the other documentation there. Eastep said that after checking off the paperwork, Tebo then "took off," saying he was going to speak to Baker about the paperwork.

Eastep confirmed that in a meeting later that day, Tebo and Baker were called in to discuss the matter; Brandon Reed, the quality supervisor, Ortiz, and Eastep attended on behalf of management. Eastep said that Tebo informed them that he had discovered six additional incorrectly filled out approval forms, basically six problematic crucibles were involved with incomplete forms. <sup>214</sup> According to Eastep, Baker said he was not aware of these six incomplete forms but admitted that he may have failed to mark one of the forms. Eastep emphasized that he had never known of any employee to check off a crucible approval sheet without going back to the lab and rechecking the proper paperwork.

Eastep stated that while he was aware that Tebo and Baker were disciplined with suspensions for the paperwork issue, he had no role in the action. However, he recalled that when Baker returned to work from his suspension on about June 24,

<sup>&</sup>lt;sup>209</sup> Baker explained in some detail how he tests a puck for chemical analysis. Baker said he followed this procedure on that day with all the crucibles.

<sup>&</sup>lt;sup>210</sup> More likely Brandon Reed.

<sup>&</sup>lt;sup>211</sup> Baker identified the formal warning he signed on June 16, 2003, and which was also signed by Ortiz, Guthy, and Mitch Maze. (GC Exh. 43.) The warning, inter alia, recited his failure to follow procedures that ensure full metal traceability, and purported to supplement a previous documented warning that was issued to Baker on March 18, 2003, for improper metal documentation. Baker acknowledged that he had been warned on March 18, 2003, about mistakenly recording the weight of the scrap as opposed to T-bars as required. Baker admitted that he was confused as to which one he was loading into the furnace at the time. There was no loss of metal traceability then because the mistake was caught.

<sup>&</sup>lt;sup>212</sup> Baker stated that based on his experience, you could not always depend on maintenance for immediate help. However, Tebo could fix small problems. Baker also admitted that he (Baker) could not fill out work orders because of his poor spelling skills.

<sup>&</sup>lt;sup>213</sup> Baker acknowledged that Eastep told him that he would not have to do the chemical analysis, although he had learned how to use the spectrometer by May 30, and actually performed these tests between June 5 and 16.

<sup>&</sup>lt;sup>214</sup> Eastep acknowledged that he never actually saw these forms.

he (Baker) asked him what was going on in the foundry. Eastep said he informed Baker that there would only be one foundry tech working first shift there, and that would be Baker. According to Eastep, Baker said that was too much work for him; he would not be willing to do work alone. Eastep said that he told Baker that he would no longer have to test/approve the metals;<sup>215</sup> he would be just charging the furnace, delivering crucibles, and manning the degas station; and that Robert Potter and Penley would be there to assist him. However, Baker persisted, saying that he was not willing to work as the sole foundry tech, and quit.

Eastep was also aware that Tebo's official suspension ran from June 17–24, and that he had been laid off from June 17 through July 14.<sup>216</sup> When Tebo ultimately returned to work, there were about four machines running and Tebo was given "as needed" assistance from Penley or Potter; Tebo no longer was required to do the lab metal checks which, in fact, he had only been doing for about a week prior to his suspension.

Directing himself to the issue of breaks, Eastep said that Tebo was always given time to take his lunch and other breaks. Eastep said that he only became aware of Baker's claim he was not getting breaks when Baker told him. Eastep said he told Baker to tell him when he needed help or his breaks. Eastep could not say whether Baker was able to take all of his breaks, but noted that Baker did tell him he could not get breaks because he was behind or too busy.

Regarding their respective duties, Eastep said that Baker and Tebo, as foundry techs, were always responsible for charging the furnace and that their job descriptions bear this out. Eastep denied that they were given this duty because Penley was given additional duties.

Eastep recalled having spoken to Tebo as lead foundry tech prior to May 2003 about running the foundry with only two workers and their being able to get their breaks without problems. Around May 15, 2003, Eastep said he again spoke to Tebo about manpower needs in the foundry and Tebo said that the work could be accomplished then with only two workers. Eastep asked him to document his (Tebo's) thoughts on the matter. <sup>217</sup>

Eastep was aware that Tebo quit his employment on about August 26, 2003. According to Eastep, he reported for work early that day because the Company was to start production of the HB, the Chrysler steering knuckle, utilizing two additional

machines and running 10-hour shifts. However, Eastep said that he was advised by Dale Potter, a casting machine operator, that there were problems with the metal on the two additional machines.

Eastep said he proceeded to the foundry to consult the down-timesheets<sup>218</sup> to determine what the problem was. However, the sheets were not available at the usual posting place. Eastep said he consulted Tebo, who initially said that he did not know where the sheets were but that he had not had time to fill them out in any case. Tebo later said the sheets were "down in the foundry." Eastep eventually located the sheets but they were blank. He then returned to Tebo and admonished him, saying that the sheets had to be completed. According to Eastep, Tebo "blew up," said he was working too hard that he had no time to fill out the sheets, that if he (Eastep) did not like it, to take the job and shove it. Tebo thereupon threw off his hat, safety glasses, and gloves and left the area.

Eastep denied assigning Tebo and Baker any duties to get them to quit. Actually, according to Eastep, he was trying to get them to do the duties already assigned to them. Eastep said that he believed Tebo and Baker were taking advantage of Penley's having other assignments and not always available to clean the furnaces. If the furnaces were not cleaned, Tebo and Baker would not have to run metal. Accordingly, Eastep believed that Tebo and Baker had time on their hands, not enough work. Eastep felt that assigning them additional duties was appropriate.

By the same token, Eastep also did not think that Tebo and Baker were working any harder than other foundry employees. He noted that Penley was available to assist them. However, the second and third shifts foundry tours were manned by Bownes and Hosford, each working alone and performing all the furnace checks and metal analysis from May 28 to August 26, 2003.

Eastep acknowledged that Ortiz and he decided to assign Baker and Tebo the additional metal analysis duties, but only because the regular process monitor (Loomis) who usually performed these duties had her hands full with other problems<sup>220</sup> in the plant and because they both felt that the two men could learn the function in a short time—about a week—through Guthy's instruction.

Eastep stated that he had no concerns that Tebo (and presumably Baker) would not be able to handle the furnace charging and the metal testing duties. <sup>221</sup> However, he acknowledged that after a time, Tebo complained a lot about needing help, that

<sup>&</sup>lt;sup>215</sup> Eastep said that Baker had only been doing the metal checks for perhaps a week before he was suspended. Eastep also noted that while Tebo and Baker were on suspension, there was only one person (Bownes) working in the foundry doing what Baker would have been assigned and that Bownes and Hosford were working 12-hour shifts on second and third shifts.

<sup>&</sup>lt;sup>216</sup> As noted previously, there were plantwide layoffs of hourly employees for 2 weeks in July 2003, as part of the annual shutdown in the automotive industry. Eastep said that he was also part of this layoff.

<sup>&</sup>lt;sup>217</sup> Eastep was shown a document—R. Exh. 104—which he said reflected Tebo's written statements on the issue. However, Eastep was unsure about the document when first presented to him and the Respondent's counsel never moved for its admission. I am only noting the existence of the document to complete the record. The actual contents of the document are unknown to me.

<sup>&</sup>lt;sup>218</sup> The Company had only recently established and implemented this procedure to monitor the metal production process and identify problem areas to avoid downtime. According to Eastep, downtime was an ongoing problem that was not always strictly machine related. The downtime logsheets implemented in August 2003 were different from those in place in April and May 2003.

<sup>&</sup>lt;sup>219</sup> Eastep, however, acknowledged that Penley usually charged the furnaces as one of his normal duties.

<sup>&</sup>lt;sup>220</sup> Eastep said that Marcia Loomis was preoccupied with sorting through the parts' racks to look for visual cracks and defects in the parts in order to catch problems before they left the plant.

<sup>&</sup>lt;sup>221</sup> Eastep acknowledged that Tebo and Baker constantly complained about not getting their breaks.

he was backed up and Baker was having trouble operating the metal analysis computer and needed more training. Eastep admitted that Baker was slow with the spectrometer computer and there was a substantial amount of paperwork associated with the quality lab testing, for which Baker would be responsible. Eastep conceded that Baker's reading deficits kept him from filling out a simple work order but that he did not tell Guthy that Baker could not read when he sent him for training on the lab test procedures. Eastep also conceded that Baker and Tebo were having a hard time and needed additional help in the foundry and in the lab. According to Eastep, he advised Guthy of the problem and Baker eventually received additional training for his lab duties.

Hema Guthy testified that he provided training on the metal testing procedures to Baker and Tebo in May and June 2003. Guthy said that at the time he was told by production management that the regular workers assigned to the quality lab to approve metal—the process monitors—were to be reassigned to other duties because fewer machines were running and the foundry workers could perform the metal checks in addition to their normal foundry duties. Accordingly, he was asked to train Tebo and Baker on metal testing. Guthy acknowledged that Baker was particularly hard to train, and he repeatedly (5 to 10 times) had to train him in the procedures and operations associated with metal testing such as what to do, how to do it, and filling out the paperwork during the first week Baker was assigned lab duties.

Directing himself to the June 5 crucible mixup, Guthy stated he was asked by Brandon Reed, the quality manager, to gather data from the computer on the day's crucible activity because there may have been a loss of metal traceability. 223 The results of his effort led management to conclude that Baker had approved two crucibles #7, one after the other. Guthy said this was an obvious error because it takes about 1-1/2 hours for each crucible to cycle through the system and be again available for production. Guthy said he investigated the matter and determined that there was a crucible for which there was no documentation and deduced that this was the other "7." Therefore, while there was no loss of traceability, the error nonetheless was attributed to Baker's carelessness.

Regarding Tebo and Baker's involvement with crucible #5 on June 5, Guthy said that Baker admitted that he had not checked off all the metal approval sheets; Tebo, when confronted, told management that Baker often forgot to mark the forms and this omission had happened on more than one occasion. According to Guthy, because there was no verification of the crucible on the metal analysis log, the parts that were made on June 5 from the questioned crucible had to be put on hold. Guthy acknowledged that metal traceability was not lost due to Tebo's having checked off the box because he could resolve the

two #7 crucibles' issue. However, Ortiz, Maze, and he collectively decided to suspend Tebo and Baker<sup>224</sup> on June 16. Guthy denied that either man was suspended for union activity or prior testimony. Rather, they were suspended, according to Guthy, because of a possible loss of traceability occasioned by Tebo's checking off the chemistry box without referring to the lab documentation. Guthy maintained that their suspensions were warranted.

Guthy noted that neither Tebo nor Baker did metal checks upon their return to work. In Baker's case, Guthy said that he was particularly concerned about the many mistakes he had made in this role and was not comfortable with him continuing with the lab assignment.<sup>225</sup>

Maze confirmed that he attended the suspension meetings for both Tebo and Baker but could not recall the exact dates. According to Maze, the investigation was basically completed; moreover, Tebo had admitted that he had delivered metal in contravention of the procedures and Baker was admittedly implicated in the mixup of the crucibles. Maze said that the meetings were convened to give each man an opportunity to explain what had happened. Maze stated he did not make the decision to suspend Tebo or Baker, but the decision reached was not because of or connected to their union activities or prior testimony before the Board.

Regarding the Company's layoff procedure, Maze noted that it was to be accomplished by seniority, by department, job classification, and by shift and he informed Tebo that he was to be laid off. According to Maze, Tebo was the only foundry employee opting for the voluntary layoff because he had less seniority than Baker in the foundry on first shift. However, Tebo was offered another position in the finishing department with not substantially less pay, but he refused the offer. Maze noted that all layoff decisions were made by Barry and Ortiz since these two made all operational decisions, not he. Maze, like Barry, said that the layoffs were focused on employees who added costs and could be removed without adversely affecting the production process.

## E. Miscellaneous 8(a)(3) Violations Associated with the Maintenance Department

Paragraph 9(g) of the complaint alleges that beginning around January 2003, the Respondent withheld or reduced the

<sup>&</sup>lt;sup>222</sup> Eastep confessed that as a matter of fact, he actually thought Baker could not read at all but that Baker's inability to read never crossed his mind, so he told no one. Eastep said he never took the time to read the SPIs (on the spectrometer operating procedures) to Baker, and never told Guthy to read them to him while in training.

<sup>&</sup>lt;sup>223</sup> Guthy identified GC Exh. 38 as the document he created from the computer. This document described previously herein indicates that crucible #7 was entered twice at 8:25 a.m on June 5, 2003.

<sup>&</sup>lt;sup>224</sup> Guthy stated that Brandon Reed was not involved in this decision because he was merely standing in for him at the June 5 initial meeting with Tebo and Baker.

<sup>&</sup>lt;sup>225</sup> Guthy emphasized that Tebo and Baker were not given the metal testing duty as a punishment; rather, the Company at the time was short of personnel and (production) time. Management felt that Tebo and Baker could do the job. Additionally, he noted that their assignment fit the Company's goal of having a cross-trained work force to fill gaps when manpower was in short supply.

<sup>&</sup>lt;sup>226</sup> Maze noted that Baker and Tebo occupied a different job classification from Penley although he worked in the foundry. Maze also noted that Tebo was scheduled to be laid off prior to the Company's decision to suspend him for the June 5 incident. Maze apologetically said that he realized that Tebo suffered a kind of "double whammy" with the suspension and the layoffs occurring at about the same time but that it was simply a matter of (bad) timing.

assignment of overtime work to employees of the maintenance department.

Paragraph 9(b) charges that Lehmkuhl and Patterson caused the removal of a refrigerator, microwave oven, and chairs from the maintenance department and sealed off an area of the department providing access to a room used by and providing fresh air to the maintenance department employees.

Shembarger testified that in January 2003 (he was unsure of the precise date), he became aware that work customarily done by the maintenance department was performed by outside contractors over a weekend. Shembarger stated that he asked fellow worker Crosby about the work and was told that it entailed dismantling and removal of some die racks. Shembarger said he was familiar with the racks in question because he had built them himself and knew that to dismantle them would require use of a cutting torch, which he knew how to use. Shembarger insisted that this was typical maintenance department work and he was not offered this work.

Shembarger, again, not sure of the time frame, recalled being told by another employee—Bill Atkins—that the Company had used two nonmaintenance department employees (Ray Turner and Wayne Knuth) to do some painting in the plant on overtime.<sup>227</sup>

Regarding the removal of equipment, Shembarger stated that in April 2003, his supervisor, Lehmkuhl, closed off an area of the maintenance department and removed a refrigerator and microwave oven used by the maintenance employees. Lehmkuhl also removed some chairs the maintenance techs used to put on their work boots, make furnace repairs, and eat their lunches. According to Shembarger, Lehmkuhl offered no explanation at the time for these actions.

Shembarger noted that the effect of closing off the backroom adjacent to the maintenance department, where the workers also kept their personal and company-issued tools, was to cut off the airflow of the department, leaving the smell of the waste treatment system<sup>228</sup> to waft through the department; he noted that the windows did not offer ventilation sufficient to keep the air flowing once the doorway was sealed.<sup>229</sup>

Shembarger said that the removal of the refrigerator and microwave required maintenance workers to use the employee lunchroom on the opposite side of the plant facility. Shembarger also noted that chairs in the X-ray department were not similarly removed.

Crosby testified and also recalled that on a Saturday in January 2003, while he was working overtime, the Company utilized an outside contractor to disassemble some racks in the plant; that the process entailed using cutting torches and lift trucks to remove them from the plant. According to Crosby, usually the maintenance department did this type of work, and that Shembarger, Cook, Wagner, and Ludwig Jr. were capable of doing the job.

Patterson acknowledged that the Company did utilize outside contractors to dismantle some die cast racks. He explained that on the weekend in question, maintenance techs Crosby, Larry Brink, and Valer Pascanu were working on an overtime basis. However, he opted not to offer the weekend rack removal to the other maintenance techs—Shembarger, Cook, Wagner, and Ludwig Jr.—because "that [work] was being done on the first shift which [sic] that required supervision. Because we were moving vertical steel racks. And importantly, it had to be completed by Monday, the following Monday. The work was to be done on Saturday and completed on Saturday." (Tr. 1421.)<sup>231</sup>

In its brief, the Respondent concedes that it removed the refrigerator, microwave oven, and chairs from the maintenance department, and sealed off a room adjacent to the maintenance department. Patterson, however, explained the circumstances leading to the removal of the items and the sealing off of the room in question.

Patterson stated that during the spring of 2003, he instituted a massive cleanup of the maintenance department preparatory to an imminent general managers' meeting. The cleanup included, at his direction, the removal of all nonessential equipment, by which he meant any equipment that had nothing to do with the repair or maintenance operation of the plant. Accordingly, the refrigerator, microwave, and chairs were removed from his department. Patterson stated his decision to remove this equipment coincided with a report stemming from an environmental audit on March 26-28, 2003, which found that the old storage room adjacent to his department "demonstrated a lack of commitment to the [company] environmental policy."<sup>232</sup> Patterson said that he had never undergone an environmental audit previously and that the audit not only dealt with the room in question but the whole maintenance area. Accordingly, he decided to seal off the room which had become a collecting area for junk. Patterson said the environmental report, along with an internal audit corrective action assigned to him by the environmental auditor, caused him to undertake a general

<sup>&</sup>lt;sup>227</sup> Atkins was described as a salaried employee but nonsupervisory. Shembarger, after some prodding by the General Counsel, thought the painting occurred as part of a cleanup sometime after the first of the year, presumably calendar year 2003.

<sup>&</sup>lt;sup>228</sup> The Respondent's waste water treatment system does not process raw sewage but evidently treats only the water used as part of the casting process.

<sup>&</sup>lt;sup>229</sup> Shembarger said that Lehmkuhl ordered the maintenance workers to clean up the backroom and move a steel cabinet in front of the doorway that allowed fresh air in the plant area and which the workers used to go outside for fresh air.

<sup>&</sup>lt;sup>230</sup> It seems that the employee break/lunchroom was about a 5-minute walk from the maintenance department for the maintenance workers, who only had 10-minute breaks in the morning and afternoon.

<sup>&</sup>lt;sup>231</sup> Notably, Patterson was not queried on cross-examination about his testimony on the overtime issue, and the quotes above reflect the entirety of his reasons for not offering overtime to the other maintenance techs. Basically, it seems that Patterson's main reason for not using the normal maintenance techs was the need to complete the job by that Saturday. Patterson seemingly did not have confidence in the maintenance techs' ability to do special assignments. Notably, in this regard, Patterson, as part of his testimony, stated that with respect to the installation of cell 8, the maintenance techs could not have accomplished this task without a lot of direction and intervention from him. (Tr. 1419.)

<sup>&</sup>lt;sup>232</sup> Patterson identified R. Exh. 94, a document entitled report on the registration assessment of the environmental management system of Intermet—Stevensville from which the quote was taken.

cleanup of the department which included the removal of the microwave and the refrigerator.<sup>233</sup>

Patterson insisted that sealing off the adjacent room did nothing to block fresh air from the department, stating that the area contained windows and overhead garage doors which are open in warm weather. Patterson said that before he sealed off the area, it actually allowed very little air to circulate to maintenance department, and that in point of fact, the area of the plant with the "deadest" air was the X-ray department, not maintenance where ventilation is better because of the overhead door and window openings.<sup>234</sup>

Patterson noted that the quality department's refrigerator was removed at about the same time he removed the items from maintenance. Patterson added that at the time he ordered the removal of the refrigerator and microwave from his department, he fully intended to have them thrown away. However, the maintenance employees requested to have them placed in the breakroom. He agreed and they were moved there, with the result that there was an additional refrigerator and microwave in the breakroom.

Patterson stated that the removal of the equipment and the sealing off of the room had nothing to do with any employees' union activities.

Legal Principles Applicable to the 8(a)(3) and (4) Allegations

In Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3)<sup>235</sup> or violations of 8(a)(1)<sup>236</sup> turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. The Board's Wright Line test was approved by the United States Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.<sup>237</sup> Second, the General

Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a line or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, he is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.<sup>238</sup>

The Respondent, in order to rebut this presumption is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Mano Electric, Inc.*, 321 NLRB 278 (1996); *Farmer Bros.*, 303 NLRB 638 (1991).

While the *Wright Line* test entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that an animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113, 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).

As previously noted, the judge may also consider prior unfair labor practices in resolving this issue, as well as violations that have occurred before and after an election.<sup>239</sup>

Turning to the principles applicable to Section 8(a)(4) of the Act, which makes it unlawful for an employer to take action against an employee because he or she has filed unfair labor practice charges or given testimony at a Board proceeding, <sup>240</sup> the Board holds that the *Wright Line* analysis applies to Section

<sup>&</sup>lt;sup>233</sup> Patterson identified R. Exh. 95, the audit corrective action request which included the following proposed corrective action for maintenance: "Remove storage tanks, shot blast equipment, and un-needed equipment/items from the maintenance area . . . ."

<sup>&</sup>lt;sup>234</sup> Patterson identified a photograph of the area (R. Exh. 96), showing the overhead garage door and window layout.

<sup>&</sup>lt;sup>235</sup> Sec. 8(a)(3) of the Act (\$158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

<sup>&</sup>lt;sup>236</sup> Sec. 8(a)(1) of the Act (§158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act."

<sup>&</sup>lt;sup>237</sup> The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of

the Act. NLRB v. City Disposal Systems, 465 U.S. 822 (1984); Interboro Contractors, 157 NLRB 1295 (1966).

<sup>&</sup>lt;sup>238</sup> Yellow Transportation, Inc., 343 NLRB 43 (2004); Tracker Marine, 337 NLRB 644 (2002).

<sup>&</sup>lt;sup>239</sup> On the latter point, see *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004), holding that union animus was evident through the Respondent's many violations of Sec. 8(a)(1), (3), and (4) found to have occurred before and after the second election campaign. See also, *Atlantic Veal & Lamb, Inc.* 342 NLRB 418 (2004), where the Board noted that the knowledge element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations.

<sup>&</sup>lt;sup>240</sup> 29 U.S.C. § 158(a)(4) states that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act"

8(a)(4) claims. American Gardens Management Co., 338 NLRB 644, 645 (2002); Taylor & Gaskin, 277 NLRB 563 fn. 2 (1985).

Notably, in *Metro Networks*, 336 NLRB 63, 66 (2001), the Board, in reference to Section 8(a)(4), stated:

The Board's approach to this provision "has been a liberal one in order to fully effectuate the section's remedial purpose." *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, through Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

Discussion of the Charges; Application of Legal Principles; and Conclusions Regarding the 8(a)(3) Allegations

#### 1. The maintenance techs

#### a. The job descriptions and subsequent evaluations

The General Counsel essentially contends the job descriptions issued to the maintenance techs were not only new but contained unprecedented and onerous job requirements. He submits that the specific deadlines for the tech's acquisition of highly technical skills that they did not possess, and the new requirement that they engage in skills training during nonwork hours and without pay are illustrative of the new and onerous conditions imposed upon the techs by the Respondent. The General Counsel points out that in particular, the Respondent's requiring these employees to acquire skills on their own time and at their own expense was a true first for the Company which, according to its own witnesses, had previously paid for formal training of the techs at company expense.

The General Counsel further submits that the timing of the issuance of the new job descriptions supports the inference of unlawful motive on the Respondent's part. He notes that around the time the new descriptions were issued—May 3 through June 27, 2002—the Union's unsuccessful election had taken place only a few weeks before (April 5, 2002); and there were ongoing Board investigations of unfair labor practice charges that Judge Miserendino ultimately determined to be violations of the Act.

The General Counsel submits that the new requirements for the maintenance techs emanated from the Respondent's hostility toward the Union and its supporters who were known to be its employees in the maintenance department.<sup>241</sup>

Regarding the subsequent evaluations, the General Counsel argues that Lehmkuhl's evaluation of Crosby, Shembarger, Ludwig Jr., Cook, and Wagner, covering the period September 20 through November 2002 were the lowest either man had ever received and that each man uniformly received this low

ranking in spite of the admission by Patterson and Lehmkuhl that each had different levels of knowledge, skill, and experience in the maintenance tech position. He suggests that this formed a pattern by the Respondent to attack these maintenance techs because of their support of the union cause. The General Counsel submits that the timing of these poor reviews also points to an unlawful motive in that in September 2002, Shembarger, Crosby, and Cook testified in the Board hearing before Judge Miserendino and the poor reviews followed in September and November. He notes that the Union's authorization petition presented at the Intermet I hearing disclosed the signatures of all the maintenance techs except Valer Pascanu who was not only retained but promoted by the Respondent.

The General Counsel essentially submits that the evaluations in terms of timing and their being unfairly critical support an inference of retaliation against the maintenance techs because of their support of the Union. He notes on this latter point that the Respondent's claim that because the maintenance techs did not improve their skills they were given low rankings was not established and should not be believed. The General Counsel submits that basically the maintenance techs were performing as well as could be expected given the Respondent's failure to train them properly, that is formally, and that this purposeful lack of formal training contributed to any deficiencies they may have had in job skills and knowledge.

The Respondent contends essentially that the maintenance tech position put in place in 1998 was not materially different from the position description for that job that was issued to the affected techs in May and June 2002; these 2002 descriptions merely reflected the Company's emphasis on their acquiring skills necessary to service the new high tech machinery. The Respondent notes that the questioned position descriptions and the reviews of the techs were the first ones under the new business and production process.

The Respondent submits that the maintenance techs were all apprised, when they initially assumed the maintenance tech job, that they would be expected to improve their skills by 2002. The Respondent asserts that the time targets it placed on the techs' acquisition of the skills and duties, contrary to the General Counsel, were not onerous but somewhat generous, given that the techs had between 6 months and 2 years to gain the skills.

The Respondent asserts that it did not require the techs to undergo training and perform work on their own time without compensation, noting that some techs volunteered to undergo training on their own time (Crosby) and no tech ever applied for the tuition reimbursement available to them by company policy. On balance, the Respondent asserts that the General Counsel failed to show a discriminatory motive, that is, any connection to the tech's union activity in issuing the job descriptions. The Respondent contends that the job descriptions were issued in furtherance of the Company's urgent need

<sup>&</sup>lt;sup>241</sup> The Charging Party, in his brief, argues that the Respondent added what he describes as a whole new set of skill requirements to put pressure on the maintenance techs, employees he argues were strong supporters of the Union's organizing drive.

<sup>&</sup>lt;sup>242</sup> The Respondent cited as an example of its nondiscriminatory treatment of the maintenance techs the fact that other employees had been asked to write book reports. I have considered these. Some of the reports were written prior to (in 2001) the election; some were written between May and July 2002.

to show improvements in its efficiencies (e.g., reduction of downtime) and return on capital to the corporate parent and investors; and not because of the Union or its supporters.

Regarding the performance evaluations issued subsequently to the techs, the Respondent rejected any assertion that the evaluations were unfairly critical because the Respondent did not provide formal training in the skills listed in the job description. Rather, the Respondent asserts the evaluations were made simply as a measure of the progress the maintenance techs had made in achieving the goals set forth in the first evaluations in May and June. Basically, the Respondent asserts, the maintenance techs did not make progress and, in fact, each admitted generally that he could not perform the majority of the job skills and duties. In the case of Shembarger and Crosby, both admitted to not even trying to master the skills associated with their job; others of the maintenance techs, like Ludwig Jr., did not seem to try to learn tasks that would have enhanced their job performance.

Regarding the training issue, the Respondent insists that formal training had either been provided—the Fanuc and Prince training—or training CDs on the systems utilized at the plant were available in the company library. Moreover, the Respondent asserted that irrespective of such "formal" training, the maintenance techs had available or were provided on-the-job training daily either through Patterson and Lehmkuhl or other capable workers such as George Ludwig Sr., Don Winnell, and Torrey. Even senior maintenance techs Crosby, Shembarger, and Wagner helped train Ludwig Jr. and Cook, the more junior techs.

Basically, the Respondent contends that contrary to the General Counsel, it provided training formal and "on the job" for the maintenance techs so that they could acquire the job skills called for in the 2002 job descriptions and were given extended time to do so. However, the maintenance techs did not avail themselves of opportunities to learn and consequently were given evaluations that were fair but, nonetheless, justifiably poor.

b. Discussion and conclusions regarding the maintenance techs' job descriptions and subsequent evaluations

As a preliminary matter, it should be obvious that the charges relating to issuance of the job descriptions and the evaluations of each of the affected techs involve much and differing factual complexity. Notably, the maintenance techs each varied in skills, knowledge, and experience; they worked on different shifts and were at least at times supervised by other than the main testifying supervisors, Patterson and Lehmkuhl.

The charges themselves present a certain complexity, if not elusiveness, in that the 2002 job descriptions are alleged to have imposed new and more onerous employment conditions and the evaluations are allegedly unfairly critical. Accordingly, my examination of the record entailed considering the maintenance tech position to the extent possible both before and after the business changeover, the duties actually performed by the maintenance techs before and after; and ultimately whether they were fairly evaluated in their supposedly new positions.

The threshold issue in my view is determining whether the General Counsel proved that the Respondent issued the maintenance techs' job descriptions imposing new and onerous conditions on their employment requiring them to undergo training and perform work on their own time, without compensation on the pertinent dates. A plain reading of the charge requires me to consider whether the job descriptions issued in May and June 2002 imposed "new and onerous" conditions on their employ-

I have examined the 1998 maintenance tech position description (R. Exh. 85), which I would conclude, based on Patterson's credible testimony, governed the performance of the maintenance techs prior to May 2002. I have compared this description to the annotated job descriptions issued to the maintenance techs, Cook, Crosby, Wagner, Ludwig Jr., and Shembarger in May and June 2002, and the maintenance tech job description without annotations that served as the prototype.<sup>2</sup>

I would find and conclude that the job descriptions issued to the maintenance techs in May and June 2002 did contain "new" job requirements. For example, 244 the new description requires a maintenance tech to understand and follow the operational preventive maintenance system (item #12); must be able to demonstrate ability to operate powered lift truck in accordance with the power lift truck training manual (item #13); must be able to demonstrate ability to operate overhead crane in accordance with safe standard industry practice (item #15); troubleshoot as well as writes and designs PLC machine logic work with automated equipment programming (item #16); design, build, and repair fabrications as required (item #17); support the manufacturing operation efforts to keep a continuous flow of high quality castings through the facility and to the customer (item 18); and interface with computer software in the course of completing daily assignments (item #20). These job requirements were not in the 1998 maintenance tech job description under which these the maintenance department workers operated prior to the issuance of the new job description in 2002. I note, too, that at no time prior to 2002 were the maintenance techs put under time targets to acquire skills. That, too, was a "new" component to their jobs.

The next level of inquiry is whether the new job description requirements were more "onerous." Onerous may be defined as burdensome, oppressive, or troublesome. 245 As I view the added job requirements in the context of the Intermet's business, especially given the new process and machinery the maintenance techs would have serviced, I do not believe that these requirements were particularly onerous; in my view, they were simply necessary as management saw things.

<sup>&</sup>lt;sup>243</sup> This document is contained in GC Exh. 46 and is dated July 1,

<sup>2001.

244</sup> I will not attempt to give a point-by-point comparison of the job of representative examples to explain my finding that the maintenance techs were required to be able to perform new duties in the job description. My analysis does not concern itself with whether the techs were actually performing these duties at the time of the issuance of the new job descriptions.

<sup>245</sup> Random House College Dictionary, First Edition, A second meaning, according to the dictionary, is having or involving obligations or responsibilities, especially legal ones that outweigh the advantages.

Be that as it may, the General Counsel contends they were "onerous," as I understand his position, because the maintenance techs were given the new duties but were given no or, at best, very little and inadequate training or training opportunities to acquire the necessary skills. Additionally, the techs were expected to acquire training on their own time. First, I agree with the Respondent that generally it is beyond the purview of a judge to "second guess" an employer in matters or areas relating to the conduct of his business, and the training of its employees is one such area. It is clear on this record that the maintenance techs were afforded training opportunities (some at company expense) on the new machinery and process. Patterson noted that during the installation stage, they could have gained knowledge of the machines, and that on-the-job training opportunities presented themselves daily. There were also training CDs available to the maintenance techs. In my view, that the techs were not to be compensated to view them does not make the training unavailable or this requirement onerous. Then, too, the Company provided a tuition reimbursement program, had any of the techs desired "formal" training in areas he was required to be proficient. I note that the "onerous" nature of the new requirements was mitigated somewhat by the Respondent's setting of fairly extensive time lines for the acquisition of these skills which could be acquired theoretically through formal seminars or course work, viewing training CDs and "on the job." I would find and conclude that the job descriptions issued to Cook, Crosby, Wagner, Ludwig Jr., and Shembarger imposed new, but not onerous conditions on their employment.

We next turn to the analysis of these allegations under Wright Line.

In agreement with the General Counsel, I would find and conclude that this record clearly establishes the union activities and support of the union cause by Crosby, Shembarger, Cook, Wagner, and Ludwig Jr. Also, in agreement with the General Counsel, I would find and conclude that the record clearly establishes that the Respondent was aware of their support of the Union.

It is also clearly established in my view that the Respondent harbored animus against the Union and its supporters. In so finding, I rely in part on Judge Miserendino's animus findings in Intermet I. However, in the instant case, the Respondent's animus was also evident. In particular, and in agreement with the General Counsel, I believe the timing of the issuance of the new job descriptions is highly suspicious, coming as it did on the heels of the election in which all of the alleged discriminatees participated as union supporters and after which unfair labor charges were being brought by the Union and investigations were undertaken by the Board. In fact, as the Intermet I case was being set for trial by the Region around May 31, 2002, the Respondent had issued a new job description to Cook and by certain dates in June 2002, had issued the new job descriptions to Crosby, Wagner, Ludwig Jr., and Shembarger.

There may be a question whether the issuance of the job descriptions is an adverse action for purposes of *Wright Line*. I believe that it was and is. Notably the new job description required the incumbents to acquire skills that clearly they did not have; moreover, they were to acquire these skills within

certain time frames. This was unprecedented. As later events showed, these new requirements and the maintenance techs' failure to meet them resulted in poor ratings. One cannot reasonably separate the issuance of the new job descriptions calling for new skills to be acquired within a company-mandated time frame from the subsequent low performance evaluations the techs received based on those self-same new requirements.

Regarding the subsequent evaluations, it seems, first, that by their own admission, Cook, Crosby, Wagner, Ludwig Jr., and Shembarger as a general proposition had not gotten up to speed on the new requirements. Each man basically explained that he was not given any formal training or any time to train themselves by the Company. They were too busy doing their jobs in so many words. Second, it seems clear that because the maintenance techs were deficient there were issues of repetitive repairs and misdiagnosed problems that resulted especially in downtime concerns for the Company. Patterson and particularly Lehmkuhl, who made the evaluations, charitably, did not have much confidence in the alleged discriminatees and felt not only were not improving in their jobs but also felt they were not trying. Lehmkuhl said he felt that "they were told not to learn, I believe by you people" (Tr. 156), clearly referring to the Union or even the Board.

The Respondent is charged with issuing performance evaluations (based on the new job descriptions) to the maintenance techs unfairly critical of their work. In my view, it is difficult generally for me, as the fact finder, to determine with precision what would be a fair or unfair criticism of another's work performance covering a period of months, especially in the charged atmosphere of the instant litigation where each party is fully at odds uncompromisingly with the other. Notably, evaluations are exercises in the subjective. Patterson and Lehmkuhl recited numerous instances of each maintenance tech's poor performance to justify the low rankings given each. However, the techs, aside from getting the low marks, were never disciplined<sup>246</sup> by the Respondent and, according to the Respondent, were not laid off because of their poor performance in 2003. Therefore, in my view, the very issuance of the job descriptions, which I have found to be prima facie unlawful, must be considered in resolving the issue whether the subsequent evaluations were unfairly critical. I believe the two issues are inextricably bound one with the other. In short, it would be incongruous to find that the job description was issued out of a discriminatory or even retaliatory motive and then find that the evaluations under those job descriptions were fair. Accordingly, I would find prima facie that the evaluations, like the job descriptions, were tainted by the Respondent's animus against the Union and its supporters. My conclusion is buttressed by Lehmkuhl's statement at the hearing expressing his view that the maintenance techs were not working to acquire the skills because of the Union (or even the Board). <sup>247</sup>

<sup>&</sup>lt;sup>246</sup> The complaint allegations in par. 9(b) relating to the denial of wage increases to Crosby, Ludwig Jr., and Shembarger because of their union activities, as noted, were withdrawn by the General Counsel.

<sup>&</sup>lt;sup>247</sup> I note that I observed Lehmkuhl as he testified on this score. The words he used and his demeanor suggested that he seriously blamed the Union for the deficiencies of the maintenance techs, giving, in my view, hostility to the Union a very literal meaning.

While the maintenance techs indeed were probably not progressing in the acquisition of their skills, I, nonetheless, would find and conclude that because of the Respondent's hostility to their involvement with the Union and their exercise of their Section 7 rights, they were not given a fair criticism of their work performance on the dates in question. Along these lines, I do not believe that the Respondent would have given the techs the very unfavorable criticisms of their performance, and the lower rankings, were it not for their union support and activities. I would find and conclude that the General Counsel has prima facie established the requisite nexus between the activities of the maintenance techs and the adverse employment action, here the issuance of the new job description. I also find that the General Counsel has not met his initial *Wright Line* obligations.

Turning to the Respondent's defense, basically the Company asserts that the new requirements were premised on its change in business which utilized new equipment and technologies. There is no doubt that the Respondent had launched itself at significant cost into a new realm of endeavor. It makes only good sense then, given the new equipment, that those charged with servicing it should be brought up to speed in the words of the Respondent's management. However, as pointed out by the General Counsel and not disputed by the Respondent, the Company initiated its implementation of the new equipment in January 2001. The question that begs a response is why the Company waited until May and June of 2002 to attempt to get the maintenance techs up to speed on the new machinery. In my view, the inescapable answer is the Union's organizing drive and the active involvement of the maintenance techs therein. Thus, I would find and conclude that the Respondent's claimed reasons for issuing the new job descriptions in May and June 2002 were pretextual; that its reasons are merely a coverup of its real intention to strike at the Union and its supporters and to undermine support for the Union at its facilities. I would also conclude that the subsequent evaluations of the maintenance techs were not fairly undertaken, and were made to retaliate against the maintenance techs for their support of and involvement with the Union.

# c. The layoffs of the maintenance techs

Because I have found that the Respondent engaged in unlawful conduct with respect to the treatment of the maintenance techs in 2002, I, in accord, would find and conclude that the General Counsel has met his initial burden under *Wright Line* with respect to the charges that Shembarger, Cook, Ludwig Jr., and Crosby were laid off from their maintenance positions on certain dates because of their support of the Union and their having engaged in other Section 7 activities.

We turn to the Respondent's defense of the layoffs. I have set out in some detail the Respondent's position, mainly that economic reasons underlie its decision to lay off the maintenance techs. I do not deem it necessary to repeat those reasons because I would find and conclude that the Respondent has offered persuasive proof that the financial/economic situation at the Stevensville plant in May 2003 was such that cost-saving adjustments in the plant's operations were necessary, and that a reduction of the Company's labor costs was a rational and reasonable response to the economic exigencies then at the facility.

It seems clear to me that for the reasons cited by Barry, the Company's prospects for sales of the steering knuckles dramatically changed in spite of his best efforts to prognosticate the market. Barry credibly testified that he took a risk in continuing production of parts in the face of the uncertainty of sales in the troubled auto industry. I do not believe that he undertook this plan for any reason other than his stated reasons—to keep people working *and* create the impression that the Company was in a stronger position than it was. This was a calculated risk that at least for the first half of 2003, did not pan out. Barry is no longer employed by the Company and, though not expressed by him at the hearing, it is not a stretch to say that his miscalculation may have cost him his job.<sup>249</sup>

In any case, Barry credibly testified that he undertook costsaving measures which included staff cuts in all departments, redistributing regular employees in other departments, and eliminating temporary employees. Barry's approach also entailed his consulting with various department heads to determine how labor costs savings could be achieved. Patterson was consulted and as a result, he recommended that the maintenance techs could be laid off, basically as he stated because the machines were new and did not therefore require much maintenance; and because of the unrealized sales of parts, there would be fewer machines running and thereby requiring servicing.<sup>250</sup>

While I would accept the Respondent's economic justification for the need to lay off employees to cut costs, unresolved in my view is whether Patterson's decision to lay off the maintenance techs was tainted by unlawful motives so as to make his stated reasons for the layoffs pretextual. I am inclined to find the reasons he gave for the layoffs were pretextual. My reasons are as follows:

First, as I have stated, the Respondent, in my view, harbored animus against the Union and its supporters. Second, that animus manifested itself in the issuance of new job descriptions for and unfair performance evaluations of the maintenance techs who the Respondent felt were not earnestly applying themselves because of the Union. In April 2003, the Respondent administered to the techs a test which Barry and Patterson said was designed to provide a baseline of the maintenance tech's skills and abilities. The maintenance techs scored poorly on this test, suggesting that the techs had not progressed much at all from May and June 2002 in acquiring the skills the Respondent demanded of them. On this ground, considering its jaundiced view of these union activists, the Company's downturn in business, in my view, provided the Respondent with an

<sup>&</sup>lt;sup>248</sup> It is noteworthy that prior to the issuance of the new job descriptions and the subsequent evaluations, the maintenance techs received favorable evaluations and, where appropriate, increases in their wages.

<sup>&</sup>lt;sup>249</sup> This admittedly is speculation on my part but, in observing Barry's somewhat dour demeanor as he was asked about his departure from the Company, this conclusion is reasonable.

<sup>&</sup>lt;sup>250</sup> Maze is charged along with Patterson to have made the layoff decision for the techs. However, the record, to me, is clear that Patterson, as the maintenance department head, made the decision, which was approved by Maze and ultimately Barry.

opportunity to move them out of maintenance to the finishing department or even to get rid of them entirely should they not accept the layoff terms. Shembarger readily comes to mind in this regard. He would not accept the assignment in the final pack department, a veritable hellhole in his view.

I have also considered the Respondent's decision to lay off a major component of its maintenance department in the face of its having purchased high tech machinery that represented, according to the Respondent, about a \$10 million investment. I am somewhat skeptical of the Respondent's explanation of how less use of the new expensive machinery would justify the reduction in maintenance. On the other hand, I note that how an employer runs its business is not for me to second guess. However, I would add that the decision to lay off the maintenance techs in this context makes more sense, considering the Respondent's promotion, just prior to the May initial layoffs, of a high functioning but junior in seniority maintenance tech-Valer Pascanu<sup>25</sup> —to a position that would allow him to avoid the seniority-based layoff, but still be available to service the machinery. This move, coupled with the contemporaneous hiring of the engineering techs and Patterson and Lehmkuhl's assisting as they often did with maintenance issues, could conceivably very adequately protect the Company's investment. In this fashion, the Respondent could well afford to rid itself of the maintenance techs.

Patterson and Lehmkuhl clearly were hostile to the Union and its maintenance tech supporters because of a belief the techs intentionally did not acquire the skills to keep the machinery working, which caused the Company downtime and other production problems.

In agreement with the General Counsel, I would find and conclude that the Respondent's decision to lay off the affected maintenance techs was motivated by animus toward the Union and to defeat its attempt to organize the Respondent's employees and to avoid the Section 7 activities of the maintenance techs supportive of the Union. It is my belief, based on the record evidence, that the maintenance techs would not have been laid off by the Respondent, its economic situation not-withstanding, were it not for their involvement with and support of the union cause. <sup>252</sup> I would find a violation of the Act with respect to the layoffs of Shembarger, Cook, Ludwig Jr., and Crosby. <sup>253</sup>

# 2. The suspensions and discharges of Tom Turney and Lenora Richmond

#### a. Tom Turney

The General Counsel contends that Turney's suspension and discharge were clearly motivated by his having engaged in protected conduct. He notes that Turney was first and foremost an open and active union supporter, known plantwide among the employees and management as one of the main initiators of the union organizing effort at the Stevensville plant. Referring to Judge Miserendino's decision, the General Counsel points out that not only did the judge make a finding regarding Turney's union activism in February 2002, but also that he testified credibly about the Respondent's conduct which resulted in a finding of several violations of the Act by the Company. 254

At the time of the incident in the laboratory, which led to Turney's suspension on February 28, 2003, Turney was not directly involved in any particular union or other protected activity. Nonetheless, I would find and conclude that the General Counsel has met his initial burden under *Wright Line*. In agreement with the General Counsel, it is abundantly clear to me that the Respondent knew of Turney's active support of the Union and his testimony on its behalf, and was clearly hostile to Turney's engaging in protected activity supportive of the Union. The issue then is whether the Respondent has met its burden to demonstrate that it would have suspended and discharged Turney even in the absence of his having engaged in protected activity.

The Respondent, emphasizing the significance of the safety sensitive nature of its product, contends that Turney was not suspended or terminated because of his union activities. The Respondent notes that in point of fact, there is no dispute about the material facts surrounding Turney's discipline. First, on February 27, Guthy caught Turney rifling through the desk of a manager's paperwork when he should have been working on approving the metal and other assignments. Later, one of Turney's coworkers reported that Turney was "forging" initials on the metal analysis logsheet for February 27. Acting out of a concern that metal traceability had been lost, management initiated its investigation and attempted to gather all pertinent documentation relating to the events of February 27, ultimately coming up with a summary chart documenting metal traceability issues and possible forgery issues.

The Respondent submits that its analysis of the pertinent paperwork associated with Turney then available disclosed what it describes as a paperwork mess, so much so that metal traceability could not be accurately re-established due to the "infinite" number of possibilities as to which crucibles had been tested and those that had not. Compounding this, management also determined that Turney's initials on the metal analysis log were not of his making, that Richmond had initialed for him at various times.

<sup>&</sup>lt;sup>251</sup> Pascanu evidently did not support the union cause or at the very least did not sign the authorization petition.

<sup>&</sup>lt;sup>252</sup> It is significant to me that the Respondent, under Barry's stewardship, had never found cause to lay off workers except for the July plantwide closings associated with the auto industry. Notably, workers were never laid off even when the Respondent conducted the old barbeque parts business which Barry said was unprofitable and led to the launching of the new business.

<sup>&</sup>lt;sup>253</sup> The General Counsel argues that maintenance tech Larry Brink was also unlawfully discharged along with the other techs on May 9, 2003. Brink did not testify at the hearing. I would dismiss this part of the complaint on grounds of insufficiency of evidence necessary to apply the *Wright Line* analysis to his layoff. In short, the General Counsel did not establish the prima facie elements required by *Wright Line* with regard to Brink. Also, the General Counsel at no time offered an explanation for Brink's not appearing at the hearing.

<sup>&</sup>lt;sup>254</sup> See JD-54-03 at 44, 46, 55-56. Judge Miserendino determined that the Respondent created an unlawful impression of surveillance in its conduct toward Turney; made unlawful statements of futility of the Union's cause to Turney; and issued an unlawful warning to him to discourage his activities in support of the union effort.

At the suspension meeting, the Respondent notes that Turney admitted that he was aware that Richmond had initialed for him and agreed that metal traceability was lost; that he had made mistakes and this conduct was wrong. The Respondent submits that Turney was justifiably suspended and later terminated because metal traceability was lost because of his knowing failure to follow procedures of which he was fully aware and his knowingly allowing Richmond to initial important documents for him and enter information into the computer using his name. The Respondent further submits that Turney's termination letter fully states the Company's reasons for letting him go and that Turney's union activity had nothing to do with its decision.

In my view, the Respondent has met its burden to demonstrate that it would have suspended and discharged Turney even in the absence of any protected activity on his part.

First and foremost, the Respondent's products, cast steering knuckles, are vital to the safe operation of motor vehicles, and its procedures without question or dispute are designed to ensure that these products meet these safety concerns. Turney was, as I view the record, fully aware of the procedures and knew his job and what his responsibilities were. However, the reasons he gave for his breach of the protocols—among them his tendency to forget to remove and reenter his name in the computer when on break—are rather lame in my view. Directing Richmond to initial for him simply compounds his transgressions. Second, there seems to be no dispute that Turney committed the acts of which he was accused, and he knew that these were wrong.

The General Counsel argues that actually there was no loss of traceability and contends that the summary chart was erroneous in particular because it did not include an approval sheet for all crucibles which would have cleared up any traceability issue. He submits that because of this<sup>255</sup> and other circumstances surrounding Turney's suspension and discharge, the Respondent's reasons for suspending him and discharging him are pretexts, covering up its unlawful motives.

I would note that while the parties at the hearing went back and forth regarding the metal traceability issues, it seems beyond dispute that Turney made a number of mistakes in his documentation (and admitted as much as the hearing) and this was the situation the Respondent faced on February 28, 2003.

It appears to me that the Company undertook a legitimate and honest investigation of the matter, with a primary concern that bad parts might have gotten through its carefully crafted safety net. If its investigation later proved to be somewhat faulty, I cannot hold that against the Company given its legitimate concerns for product safety and integrity.

The General Counsel also notes that the pretextual nature of Turney's discharge is shown in its disparate treatment of Turney as compared to that of other employees, one Ron London

who mislabeled a crucible approval sheet, which failure could have resulted in loss of metal traceability, but was given a mere 3-day suspension after having been spoken to several times regarding his performance. The General Counsel also notes that Turney was not counseled about the February 27 incident in spite of his having no prior disciplines. The General Counsel also points to a possibly disparate treatment of Tim Dunne by the Respondent. I am not convinced that Dunne's, London's, and Turney's misconduct are on par with each other. It must be noted that Turney's conduct was compounded by his also having engaged in document falsification. Metal traceability was not his only issue. Also, there is Turney's seeming indifference to the nature and significance of his conduct, his evident "shrugging off" of the accusations<sup>256</sup> at the suspension meeting. These factors are not present in the case of Dunne and London. On balance, I would find and conclude that Turney's suspension and discharge were lawful, that the Respondent would have taken the action it did irrespective of his union or other protected activities and his having testified at a prior Board hearing. I would recommend dismissal of this aspect of the complaint.257

#### b. Lenora Richmond

The General Counsel contends first that he has met his initial burden under Wright Line to establish Richmond's support for the Union and the Respondent's awareness thereof-mainly by and through her having signed the authorization petition. He acknowledges that Richmond was not as conspicuous in her support for the Union as others involved in the instant litigation but that she was terminated concurrently with other individuals, presumably including Turney, a known and conspicuous activist, to cloak those terminations with an aura of legitimacy, citing Howard Johnson Co., 209 NLRB 1122, 123 (1974). While Richmond, during the pertinent period here, did not engage in any specific protected activities, it is clear that she was a union supporter and the record of her signing the authorization petition—an exhibit at the Intermet I hearings—supports the inference that the Respondent knew this. I have previously determined that the Respondent harbored a general animus toward the Union and, in my view, the animus could very well have "spilled over" onto even rather low key supporters such as Richmond. Accordingly, I would find and conclude that the General Counsel has met his initial Wright Line obligations.

As noted earlier, Richmond worked with Turney in the quality lab. The Respondent notes, and the General Counsel acknowledged, that Richmond admitted that she left Turney's name logged in on the metal analysis computer during times she ran some of the tests on metal, and that she signed Turney's

<sup>255</sup> The General Counsel also contends that the Respondent's failure to call Brandon Reed, the quality manager involved in the investigation of Turney, suggests that the reasons given by the Respondent are pretextual. Also, he submits that the Respondent's failure to quarantine the parts in the aftermath of discovery of Turney's failure points also to pretext.

<sup>&</sup>lt;sup>256</sup> I have credited Barry's testimony in regard to Turney's response to questions he posed to him.

<sup>&</sup>lt;sup>257</sup> I have made this determination ever mindful of Turney's pivotal role in the union campaign and his providing testimony at the *Intermet I* hearing. I am also concerned about the countervailing issue of automobile safety that is a significant point of this case. The Act, in my view, does not insulate an employee from the consequences of not meeting his job responsibilities, especially where, as here, public safety is involved.

initials on the log sheet, actions she knew were in contravention of company procedures.

The Respondent submits that the company management team, pursuant to its investigation determined that Richmond had forged Turney's initials on the metal analysis logsheet at various times on February 27; the team also discovered that Richmond had forged Turney's initials on crucible approval sheets at various times during her shift. The Respondent notes that Richmond even acknowledged the wrongfulness of her conduct at the instant hearing. The Respondent contends that both the suspension and discharge of Richmond were justified because of her knowing violation of its procedures in the lab, forging Turney's name and entering information in the computer using Turney's name. The Respondent submits that its witnesses credibly denied making these disciplinary decisions based on Richmond's support for the Union.

I would find and conclude that the Respondent has met its burden to demonstrate that it would have taken the same action against Richmond even absent her engaging in protected activity or her support for the Union. As I have noted with respect to Turney, Richmond also knew that what she was doing was wrong and that the procedures were important and were to be followed. It is not altogether clear why she went along with Turney's requests because she knew he was not her supervisor and she did not have to do what he asked. But she volitionally and intentionally violated the procedures.<sup>258</sup>

The General Counsel, nonetheless, submits that the Respondent's reasons for disciplining Richmond are pretextual because Barry's defense shifted at the hearing by tying her discharge to loss of metal traceability in the discharge letter (Barry) but denying this at the hearing (Guthy). In my view, Barry made the ultimate decision to discharge Richardson and wrote the letter essentially informing her of his decision and the grounds therefor. Guthy was merely a part of the management team that investigated the incident, and, in my view, his views at trial pose no inconsistency regarding the actions officially taken by the Company through Barry in March 2003.

The General Counsel also attempted to establish that Richmond was treated disparately, contending that Tabby Baker had falsified furnace logs and not been disciplined. I am not convinced that the situations are comparable or that Baker committed any forgeries. Baker denied falsifying any records or committing any infractions while performing guard duty. Barry said that he could not establish any such violations. Then there is the nature of the violation, even if one were to have been established. It is arguable that not keeping the furnaces up to proper temperature which I assume will cause a disruption of the smelting of metal is quite different from falsifying records that may cause the production, sale, and distribution of bad parts. However, this is mere speculation because Barry felt he could not determine that Baker had indeed broken any rules. Richmond's case is much different. Any other comparisons of Richmond's conduct with that of other employees, including Guthy, similarly fail. I have credited Barry's testimony that the employees involved in the production process knew that they could not sign for one another. Several employee witnesses emphatically attested to this knowledge. In my view, Richmond's (and Turney's) conduct posed a serious compromise of vital quality assurance measures employed by the Respondent in the production of the steering knuckles. Accordingly, the Respondent was justified under the circumstances to discipline the two and, in my view, would have imposed the discipline irrespective of their having engaged in protected activity. I would recommend dismissal of this aspect of the complaint.

### 3. The foundry workers, Penley, Tebo, and Baker

# a. Penley<sup>259</sup>

The General Counsel contends essentially that the record is abundantly clear in three fundamental aspects: One, that Penley was an active and open supporter of the Union during the organizing effort and testified at the *Intermet I* hearing on behalf of that effort and against the Respondent. Two, that the Respondent knew of his support and activities promotive of the union cause. And three, that the Respondent harbored animus not only against the Union and employees who supported it and engaged in Section 7 sanctioned activities, but also against Board processes.

On this latter point, the General Counsel notes that Penley, who was on the organizing committee, was disciplined for allegedly not wearing his seat belt while operating the forklift within about a week of testifying at the Intermet I hearing. The General Counsel submits that these disciplines were issued as a punishment for Penley's testimony in the Intermet hearing.<sup>260</sup> He notes that the punitive nature of the discipline is clearly established because the forklift in question did not even have a seat belt installed on September 17, the date of the first discipline. Thus, the General Counsel submits that Penley was punished for-basically-failing to do the impossible. Also, according to the General Counsel, Penley was treated disparately regarding the seat belt issue in that employee Dior Turner on occasion operated the forklift without a seat belt and told a manager<sup>261</sup> (Safety Director Charles Goldfuss) that the lift did not have a seat belt. Turner was not disciplined and, in fact, prior to the first September writeup, Penley himself had never been disciplined by the Respondent for failure to wear a seat belt or for bumping into things occasionally, which the General

<sup>&</sup>lt;sup>258</sup> I note that Richmond appeared to be somewhat naïve and incredulous about her discharge. She seemed to know she had violated the procedure but did not think this was a fireable offense. Be that as it may, she recognized that what she did was wrong.

<sup>&</sup>lt;sup>259</sup> The complaint allegations relating to Penley also incorporate a single violation of Sec. 8(a)(4) of the Act, which will be discussed in this section.

<sup>&</sup>lt;sup>260</sup> The General Counsel points to the testimony of Crosby and Tebo as illustrative of the Respondent's antipathy toward the Board. Crosby stated that on about October 29, 2002, at a meeting with hourly and salaried workers, Barry said that the Board hearings were over, to put it all behind them—that there were new charges filed and that everybody could thank the Intermet UAW organizing committee for that. (Tr. 759.) Tebo stated that at a business operating systems meeting in October 2002, Barry said that we (the employees) had the organizing committee to thank for some more unfair labor practices coming up that were justified. (Tr. 154.) These remarks are not the subject of any charges here.

<sup>&</sup>lt;sup>261</sup> Goldfuss did not testify at the hearing and, in fact, is no longer employed by the Company.

Counsel adds also happened when other employees, including supervisors (e.g., Eastep), operated the lifts.

The General Counsel contends that Penley's September 20 write-up was also unlawful because it was conditioned on the equally unjustified false and punitive September 17 writeup, and merely reflects the Respondent's continued hostile and disparate treatment of Penley regarding the seat belt matter.

The General Counsel thus contends that the Respondent's hostility toward unionization, its knowledge of Penley's support of the Union and his related activities, its disparate treatment of him regarding the seat belt issue, the questionable validity of the accusations against him coupled with the proximity of his punishment to his testimony, compels a conclusion that the Respondent violated Section 8(a)(3) and (4) of the Act. He notes that given these factors, the Respondent's claimed justification for the disciplines are mere pretexts and should be rejected

The Respondent contends, first, Penley's September 2002 safety-related warnings were not his first at the Company and, most notably, he had seriously injured himself on the job earlier in the year because he failed to wear a safety harness. The Respondent also points out that Penley had been warned in his July 26, 2002 performance review by his supervisor to watch his forklift driving out of concern for his safety and to avoid damage to company property. The Respondent submits that Penley's careless and even reckless behavior on the job occurred long before he was written up in September 2002.

The Respondent also contends that Penley was an incredible witness and, in its view, could or would not tell the truth. Accordingly, he should not be believed as to the existence of a seat belt on his forklift on September 16. The Respondent notes that a General Counsel witness, Jerry Neville, called to establish the absence of seat belts on plant lifts during the pertinent time frame, was unable to state affirmatively that there were no seat belts on any forklifts around September 2002. The Respondent also points out that while another government witness, Dior Turner, testified that the forklift Penley operated—the shielded one—was not equipped with a seat belt, he stated that this was during the union campaign, that is prior to April 2002.

The Respondent submits the more believable witness was Michael Reitz, the outside contractor who serviced the plant forklifts and who serviced the shielded machine Penley used on September 16, 2002. Reitz' service records indicate that on September 10, the seat belt for that forklift was functional and operational.<sup>263</sup>

The Respondent also asserts that Penley was not treated disparately in that other employees had received disciplinary warnings for failing to follow the Company's safety policies. Moreover, Penley's fellow employees Bownes, Hosford, and Potter, who testified that they operated the same forklift as Penley in 2002, knew that the Company required forklift operators to wear a seat belt. Notably, Neville testified that he always wears his seat belt when operating the forklift. In short, the Respondent asserts that operating the forklift without wearing a seat belt is a proper subject for disciplinary action, along with reckless operation of the machine.

Regarding Guthy's initial discipline of Penley, the Respondent contends that Guthy credibly testified that he issued the warning to Penley on September 16 because of a report he received from a manager that Penley had been observed carelessly operating the forklift but also evidently without the seat belt. In view of Penley's history, Guthy merely wrote Penley up out of concern for his personal safety and for the Company. The Respondent asserts that the second warning was issued by Guthy because Penley, a mere 2 days later, again was observed not wearing the seat belt while operating the forklift by management, including Barry no less. This was properly viewed by Guthy to be tantamount to a continued refusal to follow the Company's safety policy.

The Respondent notes that Guthy is not alleged to have any animosity toward Penley and, in fact, the record indicates that Guthy had more in the way of a sympathy for him and tried to reassure Penley that he was not in danger of losing his job, but that safety was important. The Respondent points out that Penley himself did not deny that he was not wearing his seat belt on this latter occasion.

On balance, the Respondent contends that Penley had a history of safety-related violations and had indeed caused injury to himself as a consequence. Guthy knew of this history and received reports that Penley was again working unsafely. The Respondent contends that it would have issued the warnings to him irrespective of his union activities and prior Board testimony.

It bears noting that the complaint alleges that Guthy issued the disciplinary warnings to Penley; no other managers were implicated in their issuance except as reporting officials. The complaint essentially alleges further that Guthy issued the warnings to Penley because he gave testimony in the *Intermet I* hearing.

As to the General Counsel's Wright Line burden, I would find and conclude that he has established prima facie that the disciplines in question were discriminatorily motivated and connected to Penley's testimony at the prior hearing. I note, and the Respondent does not dispute, that Penley was a known activist and that he testified at the Intermet I hearing. I have previously found that the Respondent harbored animus against the Union and its supporters, among whom Penley (a member of the organizing committee) was evidently well known by the Respondent. In agreement with the General Counsel, I note that the disciplines in question were issued almost immediately

Barry also testified that there was a seat belt on this forklift on September 18.

<sup>&</sup>lt;sup>262</sup> Notably, Neville could not recall whether there were seat belts on the Company's forklifts in 2001 or 2002. He, however, stated that the machines that did not have seat belts were no longer in use at the plant. I will note that I did not find Neville's testimony very helpful in that he was unsure of dates and was rather imprecise in his testimony.

<sup>&</sup>lt;sup>263</sup> The Respondent notably submits that alleged discriminatee Cook's testimony—that he was instructed by Lehmkuhl to install a seat on the shielded fork lift in September 2002, but that he did not install a seat belt until months later—should not be believed because it is contradicted by other witnesses and Penley himself, who said that by September 18, the fork lift had a seat belt. Also, the Respondent notes that

after Penley completed his testimony and, therefore, it is reasonable to infer an unlawful discriminatory motivation on the Respondent's part in issuing them.

The General Counsel asserts pretext on the Respondent's part in the main because the first discipline was predicated on a false premise—that Penley was not using a seat belt that, in fact, did not exist. Accordingly, to the extent that the second discipline was predicated on the first, it is too false and is a mere pretext or coverup to punish Penley for exercising his right to testify at Board proceedings and engage in other Section 7 rights.

In my view, the central issue is not whether the seat belt was actually installed and Penley had not belted himself, as was clearly required. The central issue is what motivated Guthy to write him up consistent with the charges.

Guthy's September 16 writeup indicates that he was advised that Penley was operating the forklifts unsafely by Eric H. and Valerie Ortiz, management personnel.<sup>264</sup>

Guthy's first report seems to acknowledge the possibility that the seat belt may not have been present. However, the corrective action that Guthy undertook was to advise Penley that seat belts are to be worn at all times and if the seat belt is not functioning, he is to submit a work order to fix it. Penley was also advised not to operate the forklift recklessly, to slow down, and adhere to the rules regarding operation of forklifts.

Guthy's second write-up is clearly based in part on Penley's earlier improper conduct. In effect, Guthy's writeup on September 20 reflects clearly his view that an escalation in discipline was warranted because of Penley's repeated violations, this time witnessed not only by Ortiz, but Barry 2 days after the first warning. There seems to be no dispute that Penley on September 18 was not wearing the now-installed seat belt while operating the forklift. Therefore, in my view, this second warning is clearly predicated on the first warning.

Guthy was Penley's supervisor. Guthy clearly received reports from other supervisors and managers that one of his employees was operating company machinery unsafely. Guthy credibly testified that he knew of Penley's prior history, his injury on the job for failure to wear a safety harness, and the extensive time off work Penlev experienced as a result. Guthy testified that he felt a warning was necessary. When Penley incurred another violation a short time later, Guthy said he felt compelled to write him up again, but formally and with a warning of serious consequences to follow for another violation. In my view, Guthy's actions were warranted and justifiable. Moreover, Guthy's testimony about his conversations at the time with Penley, his attempts to mollify and reassure him seemed to me sincere and authentic. Moreover, Guthy's testimony about his part in the writeups was unrebutted. Penley evidently did not take issue with Guthy's writeups and offered no explanation or explication at the time of their issuance.

Parenthetically, I have some serious doubts regarding Penley's testimony regarding the nonexistence of the seat belt

on September 16. One, the outside service contractor testified that his repair record indicated that the forklift in question had a seat belt as of September 10. Then there seems to be no doubt that there was a seat belt installed on the unit on September 18. I tend to think that, contrary to Penley, the seat belt was installed on September 16 when he was first observed not wearing a belt. I am moved to this conclusion because the evidence suggests this to be true. But also, I note that Penley, being an active union supporter and seemingly unafraid to confront management, would surely have protested long and loud about being written up for not wearing a nonexistent seat belt. On this score, the General Counsel's contentions lose their force and effect.

It would be my finding that Guthy was motivated to issue the disciplines to Penley because of his unsafe operation of the forklift as reported to him, and not because of Penley's support for the Union or his prior testimony.

Accordingly, I would find and conclude that the Respondent has met its burden to show that it would have issued the warnings in question to Penley in spite of his union support and related activities and his having testified at the Board proceedings. I would recommend dismissal of this aspect of the complaint.

Moving on to the other Penley charges, as noted, the complaint alleges that the Respondent unlawfully changed Penley's maintenance technician job requirements to include assisting the final pack line and the shipping and receiving departments, scraping crucibles, and cleaning spray guns on or about May 28, 2003; the Respondent is also charged with unlawfully giving Penley job duties previously performed by Tebo and Baker on about August 26, 2003, in addition to his regular duties.

The General Counsel contends that beginning April 2002, when Penley assumed his duties as a furnace maintenance tech, he was the only foundry worker assigned to clean the furnace although on occasion, time permitting, he helped out in other areas. The General Counsel asserts that cleaning the furnace was Penley's main responsibility.

The General Counsel states that beginning in May 2003, Penley was assigned (by Eastep) duties in the shipping area and told not to charge the furnaces, a duty he normally performed. Later in May, Penley was assigned crucible scraping and spray gun cleaning duties. Then, in late May and all of June, Penley was assigned to the final pack line to file parts, a duty the General Counsel submits had never been assigned to Penley. Then, after Tebo left, Penley was assigned 12-hour shifts on August 26, and then given tasks Tebo had been performing. Penley was working at a frantic pace and the Company had by then stepped up its production. Although the Respondent later brought in employee Bownes to help in the foundry, Penley still could not get his 10-minute breaks and was in his words "being worked to death," and moreover, did not have time to clean the furnace. In spite of his complaints to Eastep, who offered to send employee Potter to help, Penley advised Eastep that he could not continue to work at the pace and under the conditions at the plant. However, nothing changed. Eventually, Penley decided to guit on September 4, 2003.

The General Counsel contends that the Respondent's decision to change Penley's work assignments was motivated by its

<sup>&</sup>lt;sup>264</sup> I am not sure who Eric H. was. He did not testify at the hearing. Ortiz, an admitted supervisor figured prominently in the *Intermet I* hearing. She is no longer employed by the Respondent and did not testify at the hearing here.

hostility toward the Union and Penley's support of it and that the change of assignments was in furtherance of the Company's plan to eradicate support for the Union.

The Respondent contends first, that Penley's job requirements were not changed. Second, that Penley's testimony was rife with inconsistencies and untruths which were rebutted by his fellow workers, that his version of what happened on the job is not worthy of belief. Third, that there was no evidence that Penley was treated disparately from other employees working in the foundry during the relevant period. Fourth, that during at least the period covering May and June, Penley did not have enough work and was given assignments to keep him busy. Last, his assignments were merely consistent with the Company's historical practice of cross-training or "flexing" its employees.

The Respondent basically submits that the General Counsel failed to establish that Penley was given additional assignments because of his union activities.

I have previously determined that the General Counsel met his *Wright Line* obligations with respect to the earlier discussed disciplines that the Respondent issued to Penley. I would find and conclude that he has, in likewise, met his burden with respect to the allegations regarding the change of Penley's job requirements and the assignment to him of additional tasks during the period covering May, June, and August 2003.<sup>265</sup>

Contrary to the Respondent, in my view, Penley's job requirements indeed were changed. Granted his job description encompassed some of the changes, such as helping out in shipping. Also, it seems that on various occasions during his assignment in the foundry department, he helped out in other departments. The General Counsel concedes this point. However, it seems clear that his main and principal job was to tend to the furnace in the foundry department and, in late May, he started getting assignments outside of that department and other duties as well.

In agreement with the Respondent, however, Penley's testimony often was inconsistent and at times confusing, if not contradictory, as he related what transpired on the job during the relevant time frame. However, I did not find him to be an incredible witness and have considered his testimony in that light.<sup>266</sup>

On balance, I would find and conclude that the Respondent has met its burden to show that its decision to assign Penley other duties were business related and consistent with the way it treated other employees. As pointed out by the Respondent, other employees like Penley have worked in departments other than their primary department. Also, Penley's fellow employees credibly testified that he worked no harder or had any more a burdensome job than they or others. Also established by the Respondent in my mind was the fact that during the period in question, business was slow and that the regular employees, including Penley, were being kept busy, especially in the period covering May, June, and July, when the sales picture was rather ominous.

I would recommend dismissal of complaint paragraphs 9(j)(2) and (r).

Turning to Penley's termination, the complaint alleges that essentially because of the Respondent's treatment of Penley as previously discussed, it caused him to leave his employment at the Company on September 4, 2003.

The General Counsel contends that the Respondent made numerous unlawful unilateral changes in the job duties and assignments of Penley and other first-shift foundry employees. He argues that Penley was forced to accept the unlawfully imposed terms and conditions of employment despite the existence of a bargaining obligation on the Respondent's part. He submits further that the bargaining obligation, if honored by the Respondent, would have protected Penley from the very self-same actions taken and the conditions imposed upon him by the Company, which actions and conditions caused him ultimately, in frustration, to terminate his employment with the Company. The General Counsel argues that Penley was constructively discharged in violation of Section 8(a)(3) of the Act by dint of the unlawful assignment of new duties and assignments to him.

The Respondent asserts that it did not cause Penley's termination, arguing rather that Penley himself stated his reasons for quitting were Bownes' slowness in performing his tasks which made for more work for him (Penley), and Penley's anticipated failure of the drug test administered to him as part of a prior disciplinary action against him.

As I view his position, the General Counsel argues that the record here supports a finding that Penley was unlawfully denied the protected representation that his collective-bargaining representative would have provided to him by the Respondent's refusal to recognize the Union and honor the bargaining obligation, both of which were ordered by Judge Miserendino in *Intermet I*. He relies on *Goodless Electric Co.*, 321 NLRB 64 (1996).

In *Goodless*, the Board determined that four union apprentice employees had quit voluntarily their jobs with the employer because of the employer's unlawful withdrawal of recognition of the union which, in turn, would cause the four to be removed from the union apprenticeship program. In holding that the four had been constructively discharged by the employer's unlawful conduct, the Board stated (at 67 and 68):

Employees who quit work as a consequence of an employer's unlawful withdrawal of recognition from their

<sup>&</sup>lt;sup>265</sup> I am mindful that Penley evidently did not engage in any particular form of protected activity in 2003. However, for purposes of *Wright Line*, I have considered the totality of the extant circumstances at the plant and would conclude that the Respondent created and maintained an ambient hostility to the Union and its supporters throughout the material period covered by the complaint. Accordingly, prima facie, the General Counsel has connected Penley's prior union involvement and support, as well as his testimony at the *Intermet I* hearing, with the charges in question.

<sup>266</sup> I recognize that for the average working person, it would be difficult to relate with precision what he or she did on the job on a daily basis covering several months. In my view, Penley did the best he could in trying to explain his activities on the job, including the changes instituted, the pace of the work, breaks he took and did not get to take, and the like.

<sup>&</sup>lt;sup>267</sup> I have credited the testimony in particular of Bownes and Loomis in this regard. They both, in my view, seemed neutral regarding the union issue and testified in a matter-of-fact fashion.

collective-bargaining representative and unilateral implementation of changes in their terms and conditions of employment have been constructively discharged in violation of Section 8(a)(3) and (1). White-Evans Co., 285 NLRB 80, 81 (1987); Superior Sprinkler, Inc., 227 NLRB 204 (1976). The theory of this violation is that employees have the statutory right to union representation as well as the contractual benefits negotiated by their representative. They may not be forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer. Noel Corp., 315 NLRB 905, 909 (1994); RCR Sportswear, 312 NLRB 513 (1993).

While the *Goodless* facts are not exactly on point here, I believe the principles enunciated there are applicable here. As I have stated more at length in another section of this decision dealing with the 8(a)(5) allegations, the Union here on the authority of Judge Miserendino's *Intermet I* decision was determined to be the collective-bargaining representative of the Respondent's employees, and the Respondent was ordered to bargain with it effective February 20, 2002. I have determined in that discussion that the Respondent violated Section 8(a)(5) in its treatment of Penley.

The question remains whether Penley quit as the General Counsel asserts, "[a]s a result of the Respondent's unlawful actions in refusing its bargaining obligation, its unlawful actions in making numerous unilateral changes to [Penley's] job assignments and particularly, because of the adverse effect the changes had on his terms and conditions of employment as alleged . . . in the complaint." (GC Br. 11.) I would answer this question affirmatively. In my view, by dint of the Respondent's treatment of him, Penley was placed in the very Hobson's choice situation that Goodless addresses. While I have found he was not discriminatorily treated, he was unilaterally tossed from one job assignment to the other and had made complaints to management about the matter. If the Union had been recognized by the Company and in place to represent him, he probably would have grieved his treatment, and bargaining over the changes would in all likelihood have been undertaken by the parties. He could not and, in spite of the possible merits of his complaint, he had no choice but to comply with the Respondent's directives or quit. He chose to work for a time.

Later, the drug testing issue arose. Clearly, the Respondent acted within its right to undertake a drug test of Penley; and Penley was not singled out for the tests. Maze and Eastep testified credibly about their conversation with Penley about the drug testing in my view, and it seems that Penley's decision to quit was influenced in part by his anticipated fear of being discovered to have used a prohibited drug. Therefore, on some level, the Respondent's argument that Penley voluntarily quit has plausibility but, in my view, only a superficial plausibility.

The essence of *Goodless* and the other cases cited is that the employee should not be forced either to leave the job or forfeit

his rights under the Act to keep his job. Here, Penley clearly accepted the job assignments, which should have been the subject of bargaining, to keep his job. However, he probably realized that because he had no union to protect him from an adverse drug test result, in which case he would be fired under his last chance agreement with the Respondent, he elected to quit his job to avoid the obloquy of a discharge for drug use. If the Union were in place, Penley, in a bargaining setting protection of his interests, may have elected to await the results of the drug test he later passed.

This, in my view, is an instance of a Hobson's choice that the Board would find violative of Section 8(a)(3). I would so find and conclude that the Respondent violated Section 8(a)(3) of the Act in causing Penley to quit his job on September 4, 2003.

#### b. Tebo and Baker

The General Counsel contends that the Respondent unlawfully changed Tebo's and Baker's regular job requirements to include charging the furnace throughout their shifts on about May 28; and, on about May 30, Baker's and Tebo's job requirements were changed to include running and documenting the lab testing of the metal samples.

The General Counsel also contends that Tebo and Baker were subjected to unlawful suspensions on June 16, on which date Tebo was also unlawfully laid off. He submits that these actions were taken against the two because of their union activities.

The General Counsel notes that Baker and Tebo were witnesses for the Government at the *Intermet I* hearing and named in several charges associated with that case. He further notes that both men continued in their open support of the Union.

He argues that these changes in Baker's and Tebo's job requirements were imposed less than 2 weeks after Judge Miserendino's decision which included a bargaining order, and in which Tebo's and Baker's testimony was referred to. The General Counsel submits that the job changes by their timing evinced an unlawful motivation on the Respondent's part, and reflect the Company's intensification of its ongoing efforts to undermine support for the Union, especially in the foundry and maintenance departments.

I would find and conclude that the General Counsel has met his initial obligation under Wright Line regarding the changes. In agreement with him, the timing of the changes suggests an unlawful motive by the Respondent's manager, Eastep, who along with upper level managers knew or certainly should have known that both employees were union supporters. Regarding the "changes," I have credited both Tebo's and Baker's testimony. I note that while both Baker and Tebo during their time with the Company had performed the furnace charging function, they did so mainly to help where a need arose or in an overtime scenario. Penley, it seems, was the person who normally charged the furnace on first shift and, as Baker credibly testified, he only lent Penley a hand with the furnace duties when he had spare time. Tebo and Baker credibly testified that at least from their point of view, the additional furnace charging duty made their jobs more difficult, especially with Penley's

<sup>&</sup>lt;sup>268</sup> Notably, Penley was not called to rebut this testimony from Maze and Eastep. I will assume then that the conversation between Eastep and Maze and Penley took place and were accurately reported by Maze and Eastep.

being assigned to the shipping department with the foundry's shielded forklift.

The General Counsel asserts that it is undisputed that Tebo and Baker, prior to May 30, had not been responsible for any tasks in the quality lab and that any justifications for this and other changes offered by the Respondent are pretextual. I would agree with the General Counsel regarding the assignment of Tebo and Baker to lab duties. It seems that this was a significant change in their respective job duties, though only of short duration. Whether the assignment was pretextual will be discussed later herein.

Turning to the suspensions of Tebo and Baker, the General Counsel contends that both men were discriminatorily punished for the June 5 incident. He argues that the Respondent's explanations and justifications for the disciplines shifted, were inconsistent, deviated from past practice, and reflect disparate treatment.

I would find and conclude that for purposes of his initial Wright Line burden, the General Counsel has established a violation of Section 8(a)(3) with respect to the June 16 suspensions of Tebo and Baker. I have previously determined the knowledge and animus elements of the Wright Line test with respect to Tebo and Baker. In agreement with the General Counsel, I also believe that the timing of the suspensions—only issued a short time after Judge Miserendino's decision—supplies the motive element and connection. Accordingly, here, the General Counsel has prima facie established a violation of Section 8(a)(3) of the Act<sup>269</sup> by the Respondent.

Regarding Tebo's layoff, which happened to fall on the same day that he was issued his suspension for the June 5 incident, the General Counsel concedes that Tebo was told by Maze that a second round of layoffs was coming up and gave him the option of working in the final pack area but with a pay cut, or taking a voluntary layoff. Tebo exercised the voluntary layoff option. However, the General Counsel notes he was the only person laid off in the foundry. The General Counsel contends that Tebo's layoff coming as it did within a few weeks of the Intermet I decision, and was also contrary to the Company's published and established layoff procedure which says that seniority by department and job classification will be the determining factor, supports the inference that Tebo's being chosen for layoff was unlawfully motivated.<sup>270</sup>

In agreement, I would find and conclude that the General Counsel again has met his *Wright Line* burden because of the close-in-time nexus between the issuance of the *Intermet I* decision by Judge Miserendino in which Tebo is a featured witness in the context of the organizing drive and the Respondent's failure to follow its published layoff procedure with respect to him. <sup>271</sup> Again, the knowledge and animus elements are clearly established.

The Respondent first denies that Tebo and Baker were assigned any additional regular duties, including charging the furnaces and documenting the lab testing procedures on the metal samples, because of their having engaged in union activities

The Respondent points out that on first shift, there were three foundry works: Tebo as lead foundry tech; Baker served as foundry tech; and Penley was the maintenance tech; all other foundry shifts were manned by a single employee who performed all of the duties that Tebo, Baker, and Penley did together. Bownes on second and Rich Hosford on third shift were both required to and did charge the furnace, and that Tebo and Baker, prior to May 30, 2003, had charged the furnace. Amoreover, at least as to Baker, the Respondent stated that he admitted to charging the furnace as a part of his regular job prior to the period covering January 2002 through May 2003.

The Respondent concedes that Tebo and Baker were assigned the metal analysis laboratory work but submits that they were only performing this work for not much more than a week or two at most. Further, the Respondent notes that Bownes and Hosford were also assigned the metal analysis duty at the same time by Eastep because he wanted to keep them busy since fewer machines were running and the regular lab tech, Loomis, was given other duties.

The Respondent also avers that workers at the Stevensville plant have historically helped out in other departments and that cross-training was an ongoing company practice.

The Respondent argues that Eastep, who made the assignments of Tebo and Baker, did not possess or demonstrate personally any animus against the Union (or the Section 7 activities of Tebo and Baker). Moreover, the Respondent maintains that the reasons asserted by Eastep for the assignments to Tebo and Baker were related to its business needs and consequent production slowdown; the reassignment of the regular lab worker to other duties; and his concern for avoiding the layoffs of employees, particularly Tebo and Baker. The Respondent asserts that these were the reasons for assigning Tebo and

<sup>&</sup>lt;sup>269</sup> I have considered the General Counsel's assertion that Tebo and Baker were disparately treated by the Respondent as compared to its treatment of employees—Dunn and Jackson, whose misconduct was similar if not identical to that of Tebo and Baker, and even Bownes who was somewhat implicated with Dunn and Jackson. However, the incident involving Dunn, Jackson, and Bownes occurred in August 2003, much after the June 16 suspensions. Another employee, Ron London, was disciplined for mislabeling a crucible about a year before Tebo and Baker. London was suspended for 3 days but had been given several warnings previously. I am not convinced that this connotes disparate treatment because irrespective of the prior warnings, London, like Tebo and Baker, was suspended, which to me is the operative aspect of the discipline. Notably, it seems that both Tebo and Baker had prior disciplines, Tebo for a safety-related infraction and Baker for recording numbers incorrectly.

<sup>&</sup>lt;sup>270</sup> See GC Exh. 47, p. 13, the Intermet employee handbook.

<sup>&</sup>lt;sup>271</sup> The General Counsel notes that Tebo actually should not have been laid off if the Respondent's policy was followed, that is, if the layoffs were to be structured according to seniority by shift and department as stated by Maze. He notes further that Patterson testified that the maintenance techs were to be laid off according to seniority within job classification. Barry, the General Counsel argues, testified first that layoffs were conducted by seniority within the plant or the department; later, he changed the structure to plantwide seniority only. Based on plantwide seniority, he contends Tebo was second only to Baker in plantwide seniority and that Penley in the foundry was more junior then Tebo, as were employees Bownes, Resenzez, and Hosford.

<sup>&</sup>lt;sup>272</sup> Bownes and Hosford, the Respondent notes, each testified that they performed all the other jobs associated with the foundry alone.

Baker the furnace charging and metal analysis duties; and that any allegation that the assignments were made because of the workers' union activities is purely speculation.

Turning to Tebo and Baker's suspensions on June 16, 2003. the Respondent denied any connection therewith to their union activities. The Respondent argues that contrary to his known obligation to follow procedures regarding crucible approvals, including ensuring that the metal had passed the three tests, entering information into the computer, completing the metal analysis log sheet, and ultimately completing the crucible approval sheets, Tebo, nonetheless, merely checked off the crucible sheet in the foundry in front of Eastep; Tebo did not, by his own admission, go to the lab and check the metal analysis log or the spectrometer readings.<sup>273</sup> Essentially, Tebo was suspended because he did not properly verify that a chemistry test had been performed. Rather, he took Baker's word and merely checked the box. Significantly, the Respondent notes that Tebo discovered six to nine additional crucibles that had not been checked off by Baker; he again merely checked them off based on Baker's say so without checking the spectrometer readings. At the June 5 meeting, Tebo admitted that he made mistakes.

Notably, The Respondent asserts that Baker also admitted at the June 5 meeting that he made a mistake with respect to crucible 5 and others as well. Tebo himself admitted that Baker would (repeatedly) forget to mark the boxes.

The Respondent maintains that on June 5, a day on which there was a visit from a potential customer, Tebo and Baker's mistakes were particularly problematic. However, the Respondent notes, they were not suspended or otherwise disciplined on the spot. Rather, the Company took time to investigate the matter before imposing any disciplinary action.

The Respondent asserts that the investigation that followed between June 5 and June 16 disclosed that Baker had entered information incorrectly, mainly by entering two crucible #7s into the computer, resulting in an immediate quarantine of the affected parts. It was also determined that Tebo violated the approval process by checking the spectrometer or metal analysis sheet. Accordingly, Baker was suspended because he also sent out several crucible approval sheets without checking the pass or fail boxes, as well as entering information incorrectly into the computer.

The Respondent asserts that a 5-day suspension—as opposed to termination—was an appropriate discipline for the two because the Company's investigation allowed the Company to reconstruct its records, and therefore metal traceability was not lost. The Respondent contends that in any case, it would have disciplined Tebo and Baker, even in the absence of their having engaged in protected activities.

Regarding Tebo's layoff on June 16, the Respondent denies that Ortiz laid him off because of his union support and activities. The Respondent asserts that Tebo, like other regular

hourly employees, was being moved to different areas of the plant to replace temporary workers as a cost-savings measure. The Respondent submits that Tebo was offered another job like other regular employees, and the decision to offer him an alternative position had nothing to do with his union activities.

Regarding the aforementioned charges, I would find and conclude as follows.

It is clear that on about May 28, 2003, and about May 30, 2003, the Respondent changed the job requirements of Tebo and Baker by assigning them additional regular duties, that is, charging the furnaces throughout their shift and running and documenting quality lab resting procedures on metal samples.

As to charging the furnace, I recognize that both Tebo and Baker had performed this duty prior to May 2003 in their respective job classifications, but charging the furnace on first shift was clearly Penley's regular job, and Tebo and Baker historically only helped out with the furnaces in limited circumstances. So, in my view, the charging duty was a significant and material change in their job requirements.

Regarding the assignment to lab work, this clearly was a change. First, based on Tebo and Baker's testimony, they had not been required to do this function prior to May 30. This fact is borne out by Guthy's having to train them on the lab's metal testing procedure. So this, too, in my view, was a material and substantial change in their regular job duties and requirements.

Be that as it may, I am persuaded that the Respondent gave them these assignments for its stated reasons and not because of their union activities. In May 2003, the Respondent's economic situation was becoming parlous, and layoffs were being considered by the Company among other cost-saving measures. I consider the assignment of Tebo and Baker to the new duties consistent with those cost-savings measures.

In my view, assigning Baker—who evidently had some literacy deficiencies which were known to Eastep and certainly later to Guthy—to the lab work with the computer and paperwork does not make much business sense. However, it is not within my purview to second guess the Respondent's business judgment. Clearly, the experiment with Tebo and Baker performing the testing procedures was a failure that the Respondent realized in short order and relieved them of this duty. On balance, I would find and conclude that the Respondent has met its burden to show that it would have given Tebo and Baker the new assignments in question irrespective of their union activities. I would recommend dismissal of these charges.

Regarding the suspensions of Tebo and Baker for the June 5 incident, I am also persuaded that the Respondent has met its burden to show that in spite of the two workers' union activities, it would have taken the subject disciplinary action against them. The Respondent clearly based its decision to suspend the two for infractions involving the testing procedures for the steering parts, a matter the Respondent consistently viewed as highly important to its operations. Both Tebo and Baker admitted that they had not followed the procedures. Baker admitted to forgetting to mark boxes, and Tebo basically admitted to only checking with Baker about the metal's passability; both knew that this was not the established procedure to ensure metal traceability and integrity. In my view, the Respondent's reaction was appropriate to the violation they determined to

<sup>&</sup>lt;sup>273</sup> The Respondent contends that Tebo's testimony that he asked Baker if all the metal was good and, getting a favorable reply from Baker, marked pass on the chemistry box for the crucible in question should not be credited. The Respondent also points out that Baker contradicted Tebo when he said Tebo approached him in the foundry, not in the lab, to inquire about suspect crucible 5.

have occurred. Neither Tebo nor Baker was terminated because metal traceability was not lost in the Respondent's view, and this makes sense when one considers the Company's treatment of Turney and Richmond, previously discussed. In my view, if the Respondent wanted to get rid of two union activists, they could certainly have done so based on the June 5 incident. Instead, the Company imposed a relatively light 5-day suspension on the two. I would recommend dismissal of this aspect of the complaint.

Regarding Tebo's layoff on June 16, I would find and conclude that his layoff was unlawful. In so finding, I believe that the Respondent has not met its burden to show that it would have taken the same action against Tebo irrespective of his union activities. In full agreement with the General Counsel, I note that the Respondent's layoff policy does not mention "plantwide security." The policy is clear in that . . . "seniority by department and job classification will be the determining factor in deciding who will be laid off." As noted by the General Counsel, Tebo had more departmental seniority than Baker. Yet, according to Tebo whom I credit, Ortiz told Tebo that he had less seniority than Baker.<sup>274</sup> Because the Respondent did not follow its own layoff procedures with respect to Tebo, in agreement with the General Counsel, I believe its claim of legitimate business justification was undercut. Considering Tebo's active unionism and his testimony at the Intermet I hearing, I would find and conclude that the Respondent's asserted reasons for its decision to lay him off are not believable. I would find a violation of Section 8(a)(3) in the layoff of Tebo on June 16.

As noted, the complaint deals with allegations of unlawful conduct toward Tebo and Baker after they returned to work on June 24, 2003, after serving their 5-day suspensions.

The General Counsel contends, one, that the Respondent unlawfully assigned to Baker alone, duties previously performed by Tebo, Penley, and Baker; and, two, when Baker quit around June 24 and Tebo was called back to work from his layoff on about July 14, the Respondent unlawfully assigned him alone, duties performed previously by Baker, Penley, and Tebo.

The General Counsel asserts that when Baker returned to work on June 24, he immediately queried Eastep whether he would have to perform Tebo's and his job functions. Eastep essentially confirmed what Baker had been told by Tebo at the union hall several days before—that he would be doing the work two employees had been doing on first shift. Explaining to Eastep that he could not do the job under these circumstances, Baker quit that very day.

Tebo was recalled on July 14 and discovered he was the only foundry tech on the first shift and that his responsibilities now included Baker's, and even Penley's furnace charging duty. This situation was compounded, the General Counsel submits, by the uptick in the Respondent's production efforts—more

machines were running—ongoing at this time, which called for Tebo to work 12-hour shifts. Still, Tebo found himself falling behind in spite of receiving some help from other workers sent over for this purpose. The General Counsel submits that in the end, Tebo, completely frustrated by the burdens placed upon him—the trigger event being not able to keep the downtime sheet current—Tebo told Eastep he had enough and quit on August 26, 2004.

The General Counsel submits that these job assignments to Tebo and Baker alone were made in response to their union activities and were part of the Company's plan to disparage and undermine the Union. He argues further that were it not for the unlawful suspensions of Baker and Tebo, coupled with Tebo's unlawful layoff on June 16, there would have been no need to reassign the first-shift foundry duties to Tebo and Baker.

The Respondent defends first by noting that Tebo and Baker were lawfully suspended. Second, the Respondent contends that when Tebo and Baker were off work, foundry workers Bownes and Hosford worked 12-hour shifts to cover the three shifts and performed all the necessary duties that Penley, Tebo, and Baker did as a team. The Respondent argues that this experience confirmed the Company's belief that only one foundry technician per shift was necessary and that the work for the foundry techs was not that strenuous. The Respondent notes that other employee witnesses (Loomis and Potter) corroborate this point and that Baker, in particular, was not required to work any harder than anyone else. The Respondent denied that Baker was assigned any duties to induce him to quit or in retaliation for his union activities.

The Respondent submits that Baker had made up his mind to quit after speaking with Tebo at the hall. Furthermore, Eastep actually told him he was going to be doing much less work than that which Tebo evidently told him. In spite of Eastep's entreaties to continue work, Baker decided voluntarily to terminate his employment. Moreover, the Respondent asserts that Baker was not treated differently from other foundry workers.<sup>275</sup>

Regarding Tebo, the Respondent notes that he was told by Maze to report to work on July 14 after the plantwide layoffs were concluded. When Tebo returned to work, there were only a few machines (four) running and Bownes and Hosford had routinely run five machines by themselves during Tebo's absence. The Respondent reasserts that the experience convinced the Company that only one foundry tech was necessary per shift.

The Respondent also notes that in spite of its determination, Tebo, nonetheless, was given help by Eastep who advised Tebo that employee Potter was available to help should he fall behind. The Respondent submits that Tebo was not unduly burdened by his being assigned to the foundry alone and that he was not so busy that he could not take his breaks. The Respondent further contends that Tebo was not credible in this regard. On balance, the Respondent argues that Tebo was not assigned any duties because of his union activities, and that Tebo's deci-

<sup>&</sup>lt;sup>274</sup> Baker had been working on a somewhat permanent basis in foundry about 1 year when he quit on June 24, 2003; Tebo had been in a permanent assignment in the foundry around 2 years when he was laid off on June 16, 2003. Baker had more plantwide seniority. As noted, Ortiz did not testify at the hearing, so Tebo's testimony is unrebutted.

<sup>&</sup>lt;sup>275</sup> The Respondent submits that, in point of fact, Bownes and Hosford, nonunion supporters, were given more duties than Baker.

sion to quit was voluntary and came about because of his emotional disagreement with Eastep's request for the downtime log.

I would find and conclude that the Respondent has met its burden to show that with respect to the assignment to Baker and Tebo of work previously done by other workers to them alone on the dates in question, it would have made this decision even absent their involvement with the Union or having engaged in other Section 7 protected activities. However, I note that the new assignments represented a substantial and material change in their jobs, especially as compared to the jobs each performed before their suspensions when Tebo and Baker basically worked as a team in the foundry. However, the Respondent's managers presented a rational and hence credible reason for assigning the two to work in the foundry alone—namely that other workers could do the foundry job alone with occasional assistance and that cost savings and other efficiencies could possibly result from this approach. I would recommend dismissal of this aspect of the complaint.

The complaint alleges essentially that the cumulative effect of the Respondent's treatment of Tebo and Baker caused each man to quit his employment: Tebo on August 26 and Baker on June 24, 2003.

I will be brief in resolving this dispute. As in the case of Penley, in my view, the Respondent unilaterally implemented changes of a substantial and material nature in the terms and conditions of Tebo's and Bakers employment. In Tebo's case, I have also previously determined that his layoff on June 16 was unlawful. In likewise, in agreement with the General Counsel, I would find and conclude that the Respondent acted unlawfully in refusing to honor its bargaining obligation and unilaterally imposing the numerous changes to Tebo's and Baker's job requirements.

In my view, as with Penley, *Goodless Electric Co.*, supra, also controls in the case of Tebo and Baker. Tebo and Baker were both possessed of rights afforded to them by the existing bargaining obligation as determined by Judge Miserendino. However, since the Respondent failed and refused to honor that obligation, the two were essentially forced to accept whatever the Respondent handed them. This they did for a period of time, but with difficulty and with adverse consequences for themselves and the Company as well. In the end, each worker faced the Hobson's choice enunciated in *Goodless Electric*—forfeit your statutory rights or quit the job. In spite of what I view was a yeoman's effort to continue working in the face of repeated unilateral changes, both men finally became fed up and quit.<sup>276</sup> I believe that they were forced to leave their em-

ployment and were thereby unlawfully constructively discharged from their jobs in violation of Section 8(a)(3).

- 4. The miscellaneous 8(a)(3) allegations
  - a. The withheld overtime allegation

The General Counsel contends that the Respondent unlawfully withheld or reduced the assignment of overtime work to the employees of the maintenance department, including discriminatees Shembarger, Cook, Wagner, and Ludwig Jr., whom he contends were all capable of doing the overtime work on a Saturday in January 2003, but were not offered the work.

The Respondent contends that the General Counsel failed in its proof that overtime was withheld or reduced to maintenance department employees. By contrast, the Respondent asserts that it presented unrebutted proof that the maintenance department employees on all three shifts received overtime work. The Respondent contends that none of the maintenance techs testified that overtime had been withheld or reduced. The Respondent notes that the only proof of any possible withholding of overtime came from Crosby who said on a singular weekend in January 2003, work that maintenance employees could do was performed by an outside contractor. The Respondent further notes ironically that Crosby himself on that weekend was working overtime and two other maintenance employees were also working.

In agreement with the Respondent, I would find and conclude that first the General Counsel failed to show that overtime was withheld from or reduced for the maintenance employees as charged. This failure is fatal to the charge.

In my view, the Respondent demonstrated adequately and sufficiently that maintenance department employees, more particularly the techs, received overtime during the period covering January 2003, as well as the 2 months prior and the 4 months afterwards. As noted by the Respondent, there was no comparative evidence adduced by the General Counsel indicating that maintenance department overtime, purposely or even arguably, was withheld or reduced. The only evidence adduced by the General Counsel to support the charge, in my view, merely showed that on one weekend in January 2003, some but not all of the maintenance workers were called in for overtime work. By contrast, the Respondent's evidence showed clearly that the maintenance techs were afforded overtime opportunities over and beyond that 1 weekend in January 2003.<sup>277</sup> It appears that the Respondent needed the rack in question removed by a certain time and determined that an outside contractor was needed to do the job. There appeared to be no unlawful motive or purpose in retaining the outside contractor to do the work.

I would recommend dismissal of this charge as it relates to Section 8(a)(3) of the  $Act.^{278}$ 

<sup>&</sup>lt;sup>276</sup> I note on this score that Baker was a long-time employee who seemed to be a good and willing worker over his career. However, it seems he was illiterate. It is a mystery to me why the Respondent would assign him to work with computers and paperwork governing an important aspect of the operation. Nonetheless, Baker tried to overcome his problems and aside from his mistakes on June 5 did not perform poorly.

Tebo also impressed me as another good and willing worker, imbued with a strong measure of pride in his work for the Company. He did not seem to be the kind of worker to simply walk off the job unless things had indeed become unbearable for him.

<sup>&</sup>lt;sup>277</sup> See R. Exh. 128.

<sup>&</sup>lt;sup>278</sup> I should note, arguendo, that even if the General Counsel had met his *Wright Line* burden, I would, nonetheless, find that the Respondent has met its burden to show that it would have contracted out the rack work because of business necessity even in the absence of the union activities of the maintenance techs.

#### b. The removal of items from the maintenance department

It is undisputed that the Respondent caused the removal of the refrigerator, microwave oven, and chairs from the maintenance department and sealed off an adjacent room there also.

The General Counsel contends that these actions violate Section 8(a)(3) of the Act.

The Respondent argues that the charge in the first instance is trivial and insignificant and should be dismissed. However, while not couching its defense in terms of *Wright Line*, the Respondent offered its reasons for the changes, which have been discussed previously in this decision and will not be repeated here.

I would find and conclude that for purposes of *Wright Line*, the General Counsel has met his burden to show prima facie the unlawfulness of the Respondent's actions. However, I would find and conclude that the Respondent has met its burden to show that it would have removed the equipment and sealed off the room in the maintenance department, notwithstanding the maintenance techs' union activities. I am persuaded that the Respondent basically undertook a cleanup of the maintenance department stemming from an environmental report from an outside source, and that the cleanup included the equipment removal and closing off of the room which had become a repository for junk. The Respondent's action, in my view, had nothing to do with the Union or its supporters. I would recommend dismissal of this aspect of the complaint as it relates to Section 8(a)(3) of the Act.

### F. The 8(a)(1) Allegations

Paragraphs 7(a) and (b) of the complaint alleges that the Respondent on or about June 10, 2003, through Jesus Bonilla, its corporate or group vice president, who was responsible for the Stevensville plant, coercively interrogated employees regarding their union sympathies and threatened its employees with plant closure and relocation if the Union "got in the plant."

The General Counsel called one witness to establish this charge. Maintenance tech Crosby testified about his encounter in the maintenance department with Bonilla whom he then knew was vice president of the light metals division of the Company, around mid-June 2003.

According to Crosby, on the day in question, Bonilla approached him in the plant while he was operating a forklift and pointed to his (Crosby's) pen holder<sup>279</sup> and then asked him why we wanted a union in the plant. Crosby said that he told Bonilla he wanted a fair deal at the plant. Crosby said that Bonilla responded that once a union is here, you can't get rid of it. According to Crosby, Bonilla also said that the Company had invested a lot of money in the plant; (but) it could be relocated. Bonilla also allegedly asked Crosby if he (Crosby) knew that the Company had a new plant in Tennessee. Crosby said that he did not respond to this and, thereupon, became "kind of nervous." Then Bonilla asked Crosby if he knew that he (Bonilla) had just closed an Intermet plant. Crosby told Bonilla that he was aware of this because the closure was posted on the

company bulletin board. Bonilla went on to say that, in fact, he was on his way later that day to attend to another plant closure. Crosby said he then told Bonilla that a group of employees would like to meet with him and discuss some (union related) things with him. According to Crosby, Bonilla wanted to meet immediately. However, Crosby said that he did not want to meet without consulting first with (presumably) the Union or other workers and asked Bonilla about a later date. Crosby said that Bonilla acquiesced. Bonilla gave him a business card<sup>280</sup> and told him to call him later. Crosby noted that there were no other persons in the immediate area where this conversation occurred; other employees were yards away, and he could not say if anyone saw him speaking with Bonilla.

Jesus Bonilla testified at the hearing and acknowledged that in June 2003, he was the Respondent's vice president of the light metals group which includes nine plants, one machinery and eight casting plants, including the Stevensville plant. <sup>281</sup> Bonilla had occupied the position since September 16, 2002. Bonilla stated that he knew Robert (Bing) Crosby as an employee at the Stevensville plant. Bonilla acknowledged that he had a conversation with an employee operating a forklift that involved the Union. However, Bonilla said that the employee was not Crosby. Bonilla denied both ever pointing to that employee's pen holder and asking him why he wanted a union in the plant. He explained what happened on that day.

Bonilla said that in June 2003, he was, as is his custom, doing a "walk around" of the plant and, while on the north side of the building in a hallway area, happened upon a forklift driver backing up with some loaded material. Bonilla said he was waiting for the operator to complete his maneuver, whereupon the operator stopped and motioned for Bonilla to come over to him.

According to Bonilla, the operator then asked him if he were the "big cheese," to which Bonilla said he supposed that he was. Bonilla stated that the employee then said that five other employees wanted to speak to him and would that be possible. Bonilla said he asked the man what would the conversation cover and the man, while touching his shirt on which there was a union (local) number, said that "we" want to talk bout some concerns they had. Bonilla said that he could not talk to them as he was leaving in around 30 minutes. However, Bonilla said he gave the man his card and told him he would be in the office on the following Monday. Bonilla said the man took the card and said "good," because we want to talk to you. Bonilla noted that that was the only time anyone (I presume among the workers) talked to him about a union.

<sup>&</sup>lt;sup>279</sup> Crosby stated that among the union paraphernalia he wore to work as a part of his organizing efforts was a UAW organizing committee pen holder that he kept in his shirt pocket.

 $<sup>^{280}</sup>$  Crosby identified GC Exh. 23 as a copy of the business card Bonilla gave him on the day in question.

<sup>&</sup>lt;sup>281</sup> Bonilla later terminated his employment with the Respondent. At the time of his testimony, he was no longer employed at Intermet.

<sup>&</sup>lt;sup>282</sup> On cross-examination, Crosby stated that at the time of his encounter with Bonilla, he was hauling a piece of steel on his lift truck, backing out of the maintenance department.

<sup>&</sup>lt;sup>283</sup> On cross-examination, Bonilla said the man pointed to his pen holder which had on it a union logo. Bonilla stated that he was aware of the union organizing campaign prior to this conversation, as well as the prior Board hearing and the charges involved there.

Bonilla specifically denied telling the man once a union gets here, you cannot get rid of it; and that the Company had invested a lot of money in the plant and it could be relocated. He also denied asking the man if he knew the Company had a plant in Tennessee; or that the Company had just closed an Intermet plant. Furthermore, Bonilla averred that he has not before or after the conversation closed any Intermet plants; or that he was on his way to close one. Bonilla acknowledged, however, that on or about May 29, 2003, the Company had issued a press release announcing its plans to close its Radford, Virginia foundry.

Bonilla said that after the conversation, he returned to his office and happened upon Barry to whom he related what had just occurred since the employee had said that he would be calling him. Bonilla said he also called the corporate attorney regarding the legality of any conversation with an employee. <sup>284</sup> Bonilla said he waited for the call from the employee but received none and he let the matter drop.

Bonilla insisted that he did not know the identity of the forklift operator but was impressed with him, calling him a "pretty brave guy" who would basically have the nerve to talk to the boss of his boss. Bonilla stated that he personally took no action against the employee in question and neither did Barry.

Barry confirmed that he and Bonilla conversed about the employee on the forklift. According to Barry, Bonilla briefly described what had happened and said that the employee had asked if he could speak to the employees and that he (Bonilla) had given the man his business card.

Barry said he asked Bonilla if he could identify the forklift operator but Bonilla could only give a description that, to Barry, fit the description of employee Jerry Neville, who met Bonilla's description of Caucasian, middle-aged, and was a materials handler/forklift operator whose job often took him to the area of the encounter. Barry stated that he only discovered during Crosby's testimony at the instant hearing that the person in question was he.

Barry also confirmed that Bonilla told him that he (Bonilla) was going to contact the company attorney about the conversation in question. According to Barry, Bonilla seemed to him concerned about whether it was "legal" to speak to the employees at all should they call, irrespective of what they wanted to talk about. Accordingly, Bonilla basically told him (Barry) that he was going to speak to the company attorney to make sure if and when someone(s) called, it would be permissible to speak with him or them.

Barry also noted that in his conversation with Bonilla, he (Bonilla) did not indicate that he felt he had or may have broken the law; Bonilla did not convey to Barry any fear of having broken the law.

Discussion and Conclusions of the 8(a)(1) Allegations

The standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights rather than the intent of the speaker. Smithfield Packing Co., 344 NLRB 1 (2004). Frontier Hotel & Casino, 323 NLRB 815 (1997); Williamhouse of California, Inc., 317 NLRB 699 (1995).

An interrogation is unlawful when the questioning, viewed from an employee's perspective, reasonably tends to restrain, coerce, or interfere with the employee's exercise of protected statutory rights under the Act. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The factors to be considered in analyzing the interrogation are: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Rossmore House*, 269 NLRB 1176, 1178, fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). <sup>286</sup>

The Board has held that Section 8(a)(1) can be violated where a supervisor interrogates an employee regarding his union sentiments. *Smithfield Packing Co.*, 344 NLRB at 2; *Double D Construction Group*, 342 NLRB 910 (2004). Notably, the Board has also held that an employer's questioning of an open and active union supporter about his union sentiments, in the absence of threats or promises, does not necessarily interfere with, restrain, or coerce employees in violation of Section 8(a)(1). *Rossmore House*, supra.

It is well established by the Board that employer predictions of adverse consequences of unionization arising from sources outside the employer's control violate Section 8(a)(1) if they lack an objective basis. *Kelly Brothers Sheet Metal, Inc.*, 342 NLRB 83 (2004).

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court articulated standards for evaluating the lawfulness of employer statements. The Court stated "[a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particularly union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" Id. at 618. The Court further stated that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." Id. However, the prediction must be

carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion

<sup>&</sup>lt;sup>284</sup> Bonilla said the company attorney advised that a conversation with the employee would be permissible if the employee initiated contact. Bonilla said that he was also advised not to speak with employees alone

<sup>&</sup>lt;sup>285</sup> Barry noted that Bonilla did not actually say literally that he was concerned about the propriety of such a conversation or any legal problems that might arise therefrom, and Bonilla did not say his concerns related to the Union.

<sup>&</sup>lt;sup>286</sup> The rank of the interrogator may also be weighed as a circumstance or factor relating to the identity of the questioner in determining the coerciveness of the statement, along with the truthfulness of the reply. *Toma Metals, Inc.*, 342 NLRB 787 (2004); see also *Soltech, Inc.*, 306 NLRB 269 fn. 3 (1992), and *Facchina Construction Co.*, 343 NLRB 886 (2004).

... As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside of his control, and not "threats of economic reprisal taken solely on his own volition." [Citation omitted.]

Finally, the evaluation of the statements in question must be made taking into account the totality of the circumstances.

The threshold issue to be resolved regarding the instant charges against the Respondent is whether Bonilla made the offending comments to Crosby.

The General Counsel correctly notes that witness credibility will in large measure determine the results given the conflicting testimony of Bonilla and Crosby. The General Counsel contends that Crosby's account of the undisputed encounter between the two men is the more credible. He submits that Bonilla initially denied making threats of plant closure and inquiry of Crosby why the employees wanted a union. On cross-examination, however, Bonilla admitted he did not remember exactly what was said during the conversation. The General Counsel submits further that Bonilla's demeanor was questionable and included making a joke while responding to a question from the Respondent's counsel. By contrast, he argues that Crosby was clear and forthright in his detailed responses and exhibited the kind of demeanor appropriate for the hearing.

The Respondent argues naturally the contrary. The Respondent notes that the General Counsel produced only one witness, a self-proclaimed activist and union supporter whose testimony should be presumed "to have ill motive toward Intermet's management." (R. Br. 20.)

Counsel for the Respondent submits that Bonilla readily admitted to having a conversation with an employee he encountered on one of his customary walk-arounds of the Company's plants; he admitted that he often engaged in small talk with the workers on such tours.

Regarding the conversation with Crosby, the Respondent contends that Bonilla's version is the more credible and that his denial of the statements attributed to him should be credited over the "nonsensical" claims of Crosby. The Respondent submits that Bonilla's denials are all the more credible because as he testified, he was unsure of whether he could even speak to the employee and, as corroborated by Barry, he discussed the matter, including his having given Crosby a business card, with corporate attorneys. On the other hand, the Respondent contends that Crosby's account of the conversation should be discredited.

Sensing that the charge would be the typical one-on-one witness confrontation, I paid careful attention not only to what Bonilla and Crosby said but how they said it and their general demeanor on the stand. Crosby and Bonilla both exhibited respectable and appropriate demeanors, though Bonilla seemed a little more comfortable on the stand; Crosby was a little tenser. But, in my view, these demeanor characteristics were not that important. The stories each told in the context of the history of the cases—Intermet I and the instant litigation—became my primary focus. Clearly, this case, as should be obvious, is replete with all the antagonism and polarities atten-

dant to a hard fought unfair labor practice matter. In that light, Bonilla could be said to be highly motivated to protect his (now former) employer and deny any offending statements he may have made. Crosby, on the other hand, could be equally motivated to make a case against the Company because of his zeal for the union cause. In terms of interest and possible bias, both men stand on equal footing.

As to their respective versions of the encounter, each has a certain plausibility, but each could be attacked for minor discrepancies or inconsistencies in their testimony.

Bonilla appeared to be intelligent and held a high and responsible position in the corporate hierarchy. In all likelihood, he was well aware of the union organizing campaign, the election, the charges filed in this action, and the dos and don'ts regarding employee's rights under the Act; his consulting the company attorney supports my assessment of him. Yet, it is possible that the rampant and rife hostility by management toward the Union and its supporter could conceivably infect his thoughts and actions and cause him to make a legal misstep.

By the same token, these same circumstances and factors could equally influence Crosby, a strong and evidently aggressive unionist, to embellish his testimony to make a case against the Company.

On balance, I cannot credit Crosby's uncorroborated testimony regarding his June 10, 2003 encounter with Bonilla over Bonilla's equally credible denials. Accordingly, in my view, the General Counsel has not met his burden to establish the charges by the preponderance standard. I would recommend dismissal of this aspect of the complaint.

#### G. The 8(a)(5) Allegations

The complaint in paragraphs 9(g) through (o) and (r), 17, 18, 19, 20, 21, and 22 essentially charges the Respondent with failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) of the Act.

As noted earlier herein, Judge Miserendino in *Intermet I* on May 16, 2003, but effective to February 20, 2002, pursuant to *Gissel Packing Co.*, <sup>287</sup> ordered the Respondent to bargain with the Union as the exclusive representative of the following unit of its employees he determined was the appropriate unit concerning terms and conditions of employment at the Respondent's Stevensville facility:

All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 2800 Yasdick Drive, Stevensville, Michigan; but excluding all office clerical employees, salaried employees, guards and supervisors as defined in the Act.

The instant complaint in paragraph 12 alleges that the unit, as described above, constituted an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act. I would find and conclude on the authority of Judge Miserendino's order in JD–54–03 that the allegations in paragraph 12 are established as fact in the instant case as of February 20, 2002.

<sup>&</sup>lt;sup>287</sup> 395 U.S. 575 (1969).

I would also find and conclude based on Judge Miserendino's decision and order that as of on or about February 20, 2002, by signing authorization petitions, a majority of the unit in question designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent. I also note that Judge Miserendino found that the Union advised the Company that a majority of its employees had sought recognition of it as their exclusive bargaining representative on about February 20, 2002. Accordingly, the allegations regarding this point, paragraphs 13 and 15 of the instant complaint, are established as fact by dint of Judge Miserendino's determinations. Further, I would find and conclude that as of February 20, 2002, pursuant to Section 9(b) of the Act, the Union has been the exclusive collective-bargaining representative of unit employees as alleged in paragraph 14 of the instant complaint. Detroit Newspapers, 326 NLRB 782 fn. 3 (1998).

# 1. The substantive 8(a)(5) allegations—paragraphs 9(g) through (o) and (r)

It should be noted that some of these paragraphs generally also encompass the 8(a)(3) allegations and the earlier discussion associated therewith. Summarizing paragraphs 9(g) through (o) for purposes of the 8(a)(5) component of this case, the following are the allegedly unilateral decisions made by the Respondent in contravention of its duty to bargain (by paragraph number).

9(g) unilateral withholding or reduction of overtime work for maintenance department employees in January 2003 by the Respondent;

9(h) unilateral removal of a refrigerator, microwave oven, and chairs from the maintenance department, and sealing off access to an adjacent room by the Respondent:

9(i) unilateral changes by the Respondent with respect to the layoffs of four maintenance techs;

9(j)(1) and (2) unilateral changes by the Respondent of the job requirements and reassignments of Tebo, Baker, and Penley on May 28, 2003;

9(k) unilateral changes by the Respondent of the job requirements of Tebo and Baker on May 30, 2003;

9(l) unilateral decision by the Respondent to suspend Tebo and Baker;

9(m) unilateral decision by the Respondent to lay off Tebo on June 16, 2003:

9(n) unilateral assignment by the Respondent of duties previously performed by Tebo, Baker, and Penley to Baker alone on June 24, 2003;

9(o) unilateral assignment by the Respondent of duties previously performed by Tebo, Baker, and Penley to Tebo alone on July 14, 2003; and

9(r) assignment by the Respondent (unilateral) to Penley the duties previously performed by Tebo and Baker in addition to his regular duties on August 26, 2003.

# 2. Discussion and conclusions of the 8(a)(5) allegations

Regarding these allegations, there is in my view no real dispute between the parties as to whether the actions in question actually took place. The Respondent has conceded, for exam-

ple, that it gave no notice to the Union and hired outside contractors, as opposed to any of the maintenance employees, to remove certain die cast racks in January 2003; however, the Respondent explained its reasons for not offering the work or any overtime opportunities to the maintenance techs. In likewise, the Respondent acknowledged its removal of the microwave and refrigerator equipment in and sealing off of a room adjacent to the maintenance department; the layoffs of the maintenance techs; its adding of work assignments and change of work duties of Tebo, Baker, and Penley; its decision to suspend Tebo and Baker; its decision to lay off Tebo; and its assignment of duties individually previously performed by Tebo, Baker, and Penley to either Baker and/or Tebo. The Respondent has at great length sought to justify its actions where these matters are related to the 8(a)(3) violations; and these justifications, according to the Respondent, relate to the 8(a)(5) allega-

The Respondent (through Barry mainly) has admitted that the Company at no time, with respect to the allegations of its having taken unilateral decisions regarding the matters in question, ever gave substantive notice to the Union about them; and the Union was never given an opportunity to bargain over the issues. Barry admitted that the Company's position is that it has never had any obligation to bargain with the Union about any of its actions or the effects of any such decisions on the terms and conditions of unit employees. (Tr. 487–489.) Thus, in a very basic sense, the Respondent admits that it did not satisfy 8(d)'s requirements that the parties meet at reasonable times, and confer in good faith, and negotiate regarding wages, hours, and other terms and conditions of employment of unit employees. *Electrical Workers Local 15 (Commonwealth Edison Co.)*, 341 NLRB 336 (2004).

Thus, the essential issue for me is whether the matters covered in paragraphs 9(g) through (o), and (r) invoke the imposition of a duty to bargain within the meaning of the Act. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); specifically, whether the changes are material, substantial, and significant ones affecting the terms and conditions of employment of bargaining unit employees. *Central Telephone Co. of Texas*, 343 NLRB 987 (2004).

As noted by the General Counsel, once the employees are represented by a labor organization and the bargaining obligation attaches, the employer is obliged to refrain from making unilateral decisions affecting its workers' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). The General Counsel submits that the employer acts at its peril in making unilateral changes with respect to mandatory subjects of bargaining. *Consec Security*, 328 NLRB 1201, 1203 (1999).

Turning to the individual allegations in paragraphs 9(g) through (o), I would find and conclude that the Respondent violated Section 8(a)(5) in each instance. The Respondent readily admitted that it hired an outside contractor to dismantle the die cast racks in question—work that the maintenance department workers had done previously, at least in the assembly of the racks. Therefore, if maintenance workers could build the racks, they, in all likelihood, could dismantle them, as attested to by Shembarger and Crosby. In agreement with the General Counsel, I would conclude that the Respondent's unilateral

decision to contract out this work resulted in a loss of an opportunity for maintenance workers to make overtime pay (wages) and was therefore violative of the Act.

Regarding the removal of the equipment in the maintenance department, the refrigerator, microwave, and the chairs had evidently been located in the maintenance department for years and were not only a convenience to the workers there but also facilitated their taking periodic daily breaks; and with respect to the chairs, these were used by them to change into work clothing and to repair machinery. In my view, the Respondent's unilateral decision to remove these items substantially and materially affected the terms and conditions of the maintenance workers' employment and were thus mandatory subjects of bargaining. The removal of the items under the circumstances should have been subject to bargaining that did not occur. I would find a violation of Section 8(a)(5) regarding this action by the Company.

As to the sealing off of the room adjacent to the maintenance department, the maintenance workers evidently believed that this reduced air quality in their area—a substantial matter in my view—and one certainly affecting a "condition" of their employment in a work environment that all concede could be hot, noisy, and generally unpleasant. The Respondent's proffered reasons for sealing off the room and the possible existence of other ventilation for the area notwithstanding, the matter in my view was a subject of mandatory bargaining between the Company and the Union. Unilaterally implementing this change and without notice to the Union, in my view, constitutes a violation of the Act.

With regard to the Respondent's unilateral decision to lay off the maintenance techs; to change the job requirements and assignments of Tebo, Baker, and Penley, including assigning to Tebo and Baker alone duties previously performed by other employees; to suspend Tebo and Baker; and to lay off Tebo, little need be said.

The General Counsel submits—correctly—that based on long and established Board authorities, layoffs, changes in job requirements, transferring workers, and suspensions are material, substantial, significant, and mandatory subjects of bargaining with a bargaining unit representative. I would find and conclude that with respect to these allegations that the Respondent violated the Act in taking unilateral actions with respect to these.

I note that the Respondent advances essentially two lines of defense to the 8(a)(5) allegations. First, that it is inappropriate for the undersigned judge to render a decision in this instant litigation before there has been a final adjudication of the underlying representation case—*Intermet I*—now pending before the Board. I would reject the defense based on the *Detroit News* case, cited infra.

The Respondent's second line of defense is that the General Counsel essentially failed in its proof regarding the allegations.

For example, the Respondent argues that the General Counsel failed to establish, first, that overtime actually had been withheld from or reduced as to the maintenance department employees; and, second, that the affected employees, in fact, would have been eligible for overtime. The Respondent argues further that under the circumstances surrounding the dismantling of the die cast racks, this was not a material, substantial change affecting the terms and conditions of bargaining unit employees. The Respondent also makes a similar (in effect) argument with respect to the other allegations covering paragraphs 9(h) through (o), mainly that there was a failure of proof regarding the occurrence of the claimed unilateral decisions on its part. I disagree. In my view, the Respondent's argument misses the salient and central point of the 8(a)(5) charges. Notably, the "defense" proffered by the Company would, under normal circumstances, be the types of positions or argument the parties would consider and advance while negotiating the proposed changes in question. If there were the good-faith meeting, conferring, and negotiating envisioned by Section 8(d) by the Respondent, then there conceivably would be no charges to adjudicate.

The gravamen of the 8(a)(5) violation is failing to meet, confer, and negotiate over mandatory matters affecting unit employees. The Respondent failed to do this intentionally and by design across the board. Therefore, I do not accept the Respondent's defenses in any case regarding the aforementioned 8(a)(5) allegations in paragraphs 9(g) through (o).

We turn to the remaining substantive 8(a)(5) allegations as set out in paragraphs 17, 18, 19, 20, and 27 of the complaint.

In paragraph 16 of the complaint, the Respondent is essentially charged with directly dealing with unit employees through the agency of a retained contractor, Ron Spencer who, it is not disputed, conducted a series of meetings with unit employees to solicit their grievances and concerns regarding employment-related issues at Intermet on or about April 21, 2003.

Paragraph 17 alleges that in response to Spencer's meetings and complaints received by him from attending employees the Respondent unilaterally added a lift truck to its plant operations and relaxed a requirement that supervisors sign for stockroom materials. These are alleged as material and substantial changes in the employees' terms and conditions of employment.

The General Counsel called Barry as his witness regarding this allegation. Barry readily admitted that in April 2003, he convened meetings with unit employees for the purpose of seeking their views on how to improve the Stevensville plant facility and that the Company hired Spencer as a consultant to facilitate the effort;<sup>290</sup> in April 2003, Spencer spoke to the employees in small groups. Barry acknowledged that he told the gathered employees that they were permitted to address any of their work-related concerns with Spencer.<sup>291</sup>

<sup>&</sup>lt;sup>288</sup> I have credited the testimony of maintenance tech Shembarger in

<sup>&</sup>lt;sup>289</sup> I have considered in so finding the following authorities and the holdings therein. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431 (2004).

<sup>&</sup>lt;sup>290</sup> Spencer did not testify at the hearing. According to Barry, the Company's vice president, Bonilla, knew Spencer and had worked with him before in some capacity not disclosed at the hearing.

<sup>&</sup>lt;sup>291</sup> Tebo confirmed that Barry, in his presence, told those gathered at a business operations system (BOS) meeting that an independent surveyor would be taking employee complaints in strict confidence to solve problems between management and employees. Tebo said he

According to Barry, Spencer reported to him a number of issues that were raised by employees in Spencer's meetings. Barry noted that the concerns included wage issues, training, and attendance policies and staffing—including the Company's use of temporary workers and late performance reviews. Barry also acknowledged that the employees reported to Spencer that they needed an additional forklift truck and were concerned about the rule that a supervisor was required to sign for stockroom materials. Barry said that in response to these concerns, the Company leased an additional forklift and rescinded the rule regarding supervisor-only signing out for stockroom items.

Barry also acknowledged that Spencer prepared a formal report to the Company based on his survey of unit employees on April 23–24, 2003, in which he made comments and offered suggestions for improved employee relations. Barry stated that based on Spencer's survey and report, the Company eliminated the requirement that employees write book reports as part of their performance reviews.

Barry acknowledged that the Company instituted these changes and others<sup>292</sup> in response to Spencer's meetings with the hourly employees and that the Union was not notified about Spencer or his recommendations; there were no bargaining opportunities offered to the Union regarding these matters. Barry again candidly admitted that the Company, in this instance, felt it had no duty to bargain with the Union.

The General Counsel argues that the Respondent violated Section 8(a)(5) of the Act in utilizing its agent, Spencer, to deal directly with its employees; consequently bypassing the Union, their statutory representative, regarding their wages, hours, and other terms and conditions of employment.

The Respondent concedes that it leased the forklift, rescinded the requirement that supervisors sign for stockroom supplies, and eliminated the book report requirement. However, the Respondent contends that neither of these actions affected the employees' terms and conditions of employment; none were material or substantial changes causing any "effects" to the workers.

The Respondent also contends that until there is a final adjudication of the collective-bargaining representative issue before the Board, there can be no violation of the Act. Finally, the Respondent argues that the General Counsel failed to establish Spencer's statutory agency status.

Noting the axiomatic nature of an employer's obligation to bargain exclusively with a designated union with respect to terms and conditions of employment, the Board has enunciated the criteria to be applied in determining whether an employer has engaged in prohibited direct dealing under Section 8(a)(5) of the Act. The criteria are as follows:

(1) That the Respondent was communicating directly with union represented employees; (2) the discussion was

for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas*, 316 NLRB 979 (1995).

The General Counsel contends that the *Permanente* criteria are easily met in this case. I would agree. There is no doubt that the Respondent, through Spencer, communicated directly with its union-represented employees on the several meetings convened with the Respondent's full knowledge and authority. Barry readily admitted that the meetings were designed to solicit employee complaints about their jobs as well as the Company's policy, and possibly to resolve these problems.

As noted by the General Counsel, these survey meetings were clearly designed to undercut the Union's role in bargaining, as evidenced, inter alia, by Spencer's September 30, 2003 report which concluded with the following warning: "It is my opinion, unless very aggressive action is taken [with respect to Spencer's recommendations] this plant will easily vote in a union at the next election."

Finally, consistent with the Respondent's expressed position that it had no duty to bargain with the Union, Barry acknowledged that he did not give the Union any prior notice of its intentions to convene the employees and solicit their grievances and other concerns through Spencer. In my view, the Respondent's actions here constitute direct dealing with represented employees and violated Section 8(a)(5).

In likewise, I would find and conclude that the Respondent violated Section 8(a)(5) by adding the forklift to its plant operations, relaxed or rescinded the requirement that supervisors sign for stockroom materials, and eliminated the book review requirement as part of the employees' performance review.

First, these unilateral changes emanated directly from Spencer's impermissible meeting with the employees, which I have found were designed to undercut the Union's bargaining role. Second, contrary to the Respondent, these matters, which clearly seem to relate to wages and terms and conditions of the employees' employment, in my view, are mandatory subjects of bargaining. <sup>293</sup> Third, the Respondent failed (intentionally) to provide notice of the changes or any opportunity for the Union to bargain over them.

I note in passing that I have rejected the Respondent's argument that Spencer was not acting as its agent within the meaning of the Act. As noted by the Respondent, the Board's test for determining agency is whether, under all the circumstances, employees would reasonably believe that the purported agent was reflecting company policy and speaking and acting for management. *Cooper Industries*, 328 NLRB 145 (1999).

attended one such meeting on April 28 and the employees expressed their concerns about employment conditions at the plant to Spencer.

<sup>&</sup>lt;sup>292</sup> The report in question is contained in GC Exh. 48 and is dated September 30, 2003. The employee survey conducted by Spencer lists 18 areas of concerns as expressed by the Company's hourly work force. The above report also indicated the status of the recommendations Spencer had made in April 2003 regarding various policies at the plant.

<sup>&</sup>lt;sup>293</sup> I note that employees in the foundry, shipping, and maintenance departments use forklifts in the performance of their jobs. While the record is not altogether clear, the requirement that only supervisors sign out for stockroom supplies evidently caused some consternation among the workers regarding performing their jobs. The book review requirement was imposed on workers as part of their performance evaluation which, in turn, could affect their wages.

In my view, a finding of Spencer's agency status is warranted on either actual or apparent authority basis. Barry admitted that the Company retained him to solicit the views and possible grievances of the employees in order to effect changes in their jobs and the workplace for the benefit of the Company. Spencer met with the employees, conducted meetings, and elicited the views of the employees. He also, evidently on the instruction of Barry, assured them that these views would be taken in strict confidence by management. In my view, there was little for the employees to infer but that Spencer was working on behalf of management and had the authority to solicit their views and make recommendations beneficial to them and the Company.

Complaint paragraph 18 essentially alleges that the Respondent, through human resources manager Maze, implemented on or about June 13, 2003, a new requirement that employees punch/swipe in and out for their lunchbreaks, with no notice to the Union and without giving it an opportunity to bargain over the matter

Maze testified that upon his arrival at the Stevensville plant in 2003, the company handbook included a punch-out procedure for employees who leave the facility during their lunchbreaks. However, according to Maze, the procedure was not being enforced at the time and he was not sure that it ever was prior to his coming onboard. Maze admitted that he implemented the swipe-in procedure in June 2003 because he was concerned that employees were not receiving their 30-minute lunchbreaks. According to Maze, his concerns emanated from a prior employment experience he had in Illinois, which by regulation mandated 30-minute breaks within the first 5 hours of an employee's shift. Maze said he implemented the lunchbreak swipe-in process to ensure himself that the Intermet employees were actually taking their uninterrupted 30-minute break that he thought Michigan law also required.

Maze noted, however, that this procedure was in place for only about 5–6 months and was not in place at the time he testified. Maze explained that for one, he determined that Michigan did not have the same regulations as Illinois and, moreover, he determined that the employees were receiving and taking their lunchbreaks. The system currently in place, according to Maze, is for employees to inform him if they are not getting their meal period and he corrects the matter.

Maze stated that for all practical purposes, the Company returned to the same system in place before he implemented the swipe-in system in June 2003; essentially, the swipe-in procedure was revoked.

The General Counsel asserts that the implementation of the punch/swipe procedure was a change in the employees' terms and conditions of employment and therefore represented a bargainable issue. He notes that Barry admitted that he was aware that in June, employees were being required to punch/swipe in and out at the plant for their lunchbreaks, and that there was no notice given to the Union and no opportunity extended to the employees' representative to bargain over the procedure or its

effects. The General Counsel asserts that this change and others undertaken unilaterally between January and July 2003 by the Company were simply part of the Respondent's plan to undercut and undermine employee support for the Union. He argues that the Respondent's unilateral implementation of the swipe-in procedure violated Section 8(a)(5).

The Respondent argues that the swipe-in procedure was not a substantial and significant material change to the employee's terms and conditions of their employment because the policy was basically in effect already, simply not enforced. Moreover, the Respondent asserts that because Maze discontinued the procedure, the matter is moot. The Respondent essentially contends that the Respondent merely temporarily changed the punch-out/swipe-in procedure out of a legitimate concern for compliance with State law.

It is clear that the Respondent maintained as of at least February 1, 2001 (based on the employee handbook), a policy requiring employees to punch out when they leave for lunch and punch back in when they return from lunch where they leave the facility. Equally clear, or so it would seem, is that this policy was not being enforced from February 20, 2002, up until June 2003 by Maze. The Respondent seemingly concedes that Maze's action constituted a change. Moreover, it admits that the Union was not notified of the change or given an opportunity to bargain over the matter and its possible effects. Contrary to the Respondent, I view the implementation of an existing but unenforced policy as a substantial and significant matter, relating as it does to the workers' terms and conditions of employees. Said another way, prior to June 2003, workers were not required to punch in and out for their lunchbreaks. Unilaterally implementing the policy, especially after the Union has been recognized as the employees' bargaining representative, adds both significance and materiality to the employees' terms and conditions of employment.

The Respondent's mootness argument is misplaced as well. Clearly, if the Company had met, discussed, and negotiated this procedure before reimplementing the policy, as envisioned by the Act where there is a recognized representative, it is very possible that the bargaining process would have disclosed the nonapplicability of Illinois law, as well as Maze's mistaken belief that workers were not getting their lunchbreaks.

In any case, that the Company after 6 months decided to return to the old procedure (again unilaterally) does not absolve it of the duty under the Act to bargain in good faith with its employees' collective-bargaining representative. I would find and conclude that the Respondent violated Section 8(a)(5) of the Act in implementing the punch-out/swipe-in procedure in June 2003.

Paragraphs 19 through 22 relate to the Union's request for certain information contained in a letter sent to the Respondent on June 11, 2003.<sup>295</sup>

In the letter to Barry, the Union made a number of requests of the Company, including a request to initiate bargaining for purposes of a contract and that the Company not make any unilateral changes in the employees' working conditions. More

<sup>&</sup>lt;sup>294</sup> See GC Exh. 47, a copy of the company handbook; p. 12 recites the company policy on breaks and lunches and includes the lunchtime punch-out procedure.

<sup>&</sup>lt;sup>295</sup> The Union's letter was included as an attachment—"A"—to the complaint, and also as GC Exh. 49.

particular to the allegations in the pertinent paragraphs, the Union requested the following information as it stated in the letter "so that we may adequately prepare for bargaining:"

- 1. A copy of present employees wage rates, including hiring wages, minimum and/or maximum rates, and any time involved in reaching the maximum. In addition, we would like a complete list of employees, showing their classifications and wage rates, including status of any upgrading. This list should also show the employee's seniority, birth date and home address.
- 2. All information covering the employee vacation plan.
  - 3. All information covering holiday pay.
- 4. A copy of the employee pension plan with the most recent actuarial report.
- 5. All information covering the employee insurance program, including the name of the insurance carrier, the holder of the master policy, the agent of record, the total cost per employee for a single person, couple and family.
- 6. All information on any fringe benefit, bonus plan or any other employee benefit.
- 7. Four (4) copies of the employee handbook presently in effect.

On June 17, 2003, through Barry, the Respondent replied to the Union's letter. <sup>296</sup> Barry indicated that the Company would be filing exceptions to Judge Miserendino's May 16, 2003 decision and, in particular, would be contesting his bargaining order.

Barry stated the Company's position—mainly that the Union did not, in fact, represent a majority of its employees in the unit—and therefore refused to meet with the Union and to provide the requested information.

At the hearing, Barry acknowledged receipt of the Union's letter as well as his response thereto. Again, Barry restated the Company's position that it did not have any obligation to bargain with the Union, a position it maintained throughout the instant litigation. The information has not been provided either wholly or in part.

The General Counsel submits that an employer has an obligation to provide information relevant and necessary to the employees' bargaining representative where such information will be of use to the Union in fulfilling its responsibilities as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). He further notes that wage and related information pertaining to the employees in the bargaining unit is deemed presumptively relevant, concerning as it does the core of the employer-employee relationship at Intermet.

Notably, the Board has stated the following principles with respect to requested information going to the core of the employer-employee relationship:

Wage and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965), cited with approval in *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

Thus, if the requested information goes to the core of the employer-employee relationship, and the employer refuses to provide that requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why it cannot, in good faith, supply the information. If the information requested is shown to be irrelevant to any legitimate union collective-bargaining need, however, a refusal to furnish it is not an unfair labor practice. (Coca-Cola Bottling Co., 311 NLRB at 425 (citing Emeryville Research Center v. NLRB, 441 F.2d 880 (9th Cir. 1971)).

I note that for purposes of information requests, the Board employs a broad discovery-type standard in determining the union's right to information; this permits the union access to a broad scope of information potentially useful for effectuating the bargaining process. *NLRB v. Acme Industrial*, supra at 437 fn. 6.

Aside from Barry's testimony, the Respondent did not present any other defense to the complaint allegations in question covering the information requests.

I have considered each of the seven categories of information requested by the Union in its June 11, 2003 letter, and it seems clear to me, there being no contrary evidence, that each item calls for the production of presumptively relevant data. Category 1 calls for essentially wage rates, a list of employees, job classifications and associated wage, as well as employee birth date and home address; category 3, in likewise, relates to wages paid on a holiday basis. Categories 2, 4, 5, and 6 seek information essentially going to benefits—vacation, pension, and insurance—that the Respondent employees receive at the Company. Category 7 seeks copies of the employee handbook.

It is clear to me, in agreement with the General Counsel, that these seven categories of requested information go to the core of the employee-employer relationship and should be provided to the Union here so that it may fulfill its statutory duties as the unit's exclusive collective-bargaining representative. The Respondent's failure to provide the information, in my view, constitutes a violation of Section 8(a)(5) of the Act. <sup>297</sup>

<sup>&</sup>lt;sup>296</sup> The Company's letter was included as an attachment—"B"—to the complaint, and also included as GC Exh. 50.

<sup>&</sup>lt;sup>297</sup> See *Ethan Enterprises, Inc.*, 342 NLRB 129 (2004), where the Board approved of Administrative Law Judge Ray R. Pollack's finding of a violation of Sec. 8(a)(5) by the respondent employer there who failed to provide information nearly identical to the information requested by the Union here. I have relied in part on Judge Pollack's ample research in reaching my findings herein.

#### CONCLUSIONS OF LAW

- 1. The Respondent, Cast-Matic Corporation d/b/a Intermet Stevensville, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The International Union, United Automobile, Aerospace and Agricultural Implement of America (UAW), AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:
- (a) Issuing to employees Mark Cook, Robert Crosby, Ronald Wagner, George Ludwig Jr., and William Shembarger new job descriptions because of their union support and activities.
- (b) Issuing to employees Mark Cook, Robert Crosby, Ronald Wagner, George Ludwig Jr., and William Shembarger individual evaluation forms unfairly critical of their work performance because of their union support and activities.
- (c) Laying off employees William Shembarger, Mark Cook, George Ludwig Jr., and Robert Crosby because of their union support and activities.
- (d) Laying off Sylvester Tebo because of his union support and activities.
- (e) Causing the termination of employee Henry Baker because of his union support and activities.
- (f) Causing the termination of employee Sylvester Tebo because of his union support and activities.
- (g) Causing the termination of employee Randy Penley because of his union support and activities.
- 4. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
  - All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 2800 Yasdick Drive, Stevensville, Michigan; but excluding all office clerical employees, salaried employees, guards and supervisors as defined in the Act.
- 5. Since February 20, 2002, a majority of the employees in the above unit signed union authorization cards designating and selecting the Union as their representative for the purposes of collective bargaining with the Respondent.
- 6. Since February 20, 2002, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the above-described unit, and by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
- 7. Since February 20, 2002, and continuing to date, the Union has requested and continued to request the Respondent to recognize and bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive representative of all employees of the Respondent in the above-described unit.
- 8. Since February 20, 2002, and at all times thereafter, the Respondent has failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bar-

- gaining representative of all employees in the above-described unit.
- 9. The Respondent has violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the above-described unit.
- 10. The Respondent has also violated Section 8(a)(5) of the Act by the following conduct:
- (a) Withholding or reducing the assignment of overtime work to employees of the maintenance department.
- (b) Bypassing the Union and directly dealing, through a retained agent, with its employees to solicit and correct their grievances regarding terms and conditions of employment, including adding a lift truck to its fleet and relaxing the requirement that supervisors sign for stockroom materials.
- (c) Implementing a new requirement that employees punch (or swipe) in and out for their lunchbreaks.
- (d) Failing and refusing to furnish the Union necessary and relevant information requested by it to perform its duties as the exclusive collective-bargaining representative of the unit.
- (e) Changing the job requirements of foundry technicians Sylvester Tebo and Henry Baker by assigning them additional regular duties, including charging the furnaces throughout their shift
- (f) Changing the job requirements of furnace maintenance technician Randy Penley to include assisting the final pack line and shipping and receiving departments, scraping the crucibles, and cleaning spray guns.
- (g) Changing the job requirements of foundry technicians Sylvester Tebo and Henry Baker to include running and documenting quality lab testing procedures on metal samples.
- (h) Assigning duties previously performed by Sylvester Tebo, Henry Baker, and Randy Penley to Henry Baker alone.
- (i) Assigning duties previously performed by Sylvester Tebo, Henry Baker, and Randy Penley to Sylvester Tebo alone.
  - (j) Suspending employees Sylvester Tebo and Henry Baker.
  - (k) Laying off employee Sylvester Tebo.
- (l) Causing the removal of a refrigerator, microwave oven, and chairs from the maintenance department, and sealing off an access to an adjacent room used as a source of fresh air for the maintenance department employees.
- 11. The aforementioned conduct, in conjunction with the numbers of violations of Section 8(a)(1), (3), and (5) alleged in an amended consolidated complaint in prior Cases 7–CA–44878, 7–CA–45034, and 7–CA–4517—already litigated before Administrative Law Judge C. Richard Miserendino—is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization petitions, would on balance be protected better by issuance of a bargaining order than by traditional remedies alone.
- 12. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.
- 13. The Respondent has not violated the act in any other manner or respect.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily issued job descriptions imposing new conditions on their employment to Mark Cook, Robert Crosby, Ronald Wagner, George Ludwig Jr., and William Shembarger in violation of Section 8(a)(3) of the Act, I shall recommend that it be ordered to rescind the new and modified job descriptions issued to each man on the dates specified in the amended complaint and expunge all references thereto from its records.

Having found that the Respondent discriminatorily issued to Cook, Crosby, Wagner, Ludwig Jr., and Shembarger individual evaluation forms unfairly critical of their work in violation of Section 8(a)(3) of the Act, I shall recommend that the evaluations given on the dates specified in the complaint be rescinded and all references thereto be removed from its records.

Having found that the Respondent discriminatorily laid off Shembarger, Cook, Ludwig Jr., and Robert Crosby from their maintenance department job classifications on the dates specified in the complaint in violation of Section 8(a)(3) of the Act, I shall recommend that the Respondent offer them immediate and full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by them as a con-

sequence of the Respondent's conduct as found herein by payment to them of backpay together with interest calculated in accord with Board policy as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent discriminatorily laid off Tebo and caused the termination of Tebo, Baker, and Penley on the dates specified in the complaint in violation of Section 8(a)(3) of the Act, I shall recommend that the Respondent offer them immediate and full reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by them as a consequence of the Respondent's conduct as found herein by payment to them, together with interest calculated in accord with Board policy as set out above.

Having found that the Respondent unlawfully failed and refused to furnish the Union relevant and necessary information relating to wages and hours and other terms and conditions of employment of the unit requested by the Union pursuant to performance of its duties as the exclusive collective-bargaining representative of the unit in violation of Section 8(a)(5), I shall recommend that the Respondent provide immediately and forthwith the requested information contained in the Union's June 11, 2003 letter to the Respondent.

[Recommended Order omitted from publication.]